Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

James H. Boldt,

*Petitioner*
v.

Lia Boldt,

*Respondent*

On Petition for Writ of Certiorari
To The Supreme Court of Oregon

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

A Jewish father with "sole and legal custody" of his minor son wants to have his son circumcised by a physician (for primarily religious and secondarily medical reasons).

The Oregon Supreme Court has ruled (reversing the Trial Court and the Court of Appeals), that the father cannot do so---until after the trial court further considers the case. If trial court finds that the boy agrees, the father may have him circumcised. If the Trial Court finds that the boy disagrees, then the Trial Court is to decide whether to (a) allow the circumcision anyway, (b) condition the father's custody on not having the boy circumcised, or (c) change custody to the mother.

The questions presented are:

1. Does the Oregon Supreme Court's decision violate the Free Exercise of Religion clause of the First Amendment to the United States Constitution?

2. Does the Oregon Supreme Court's decision violate the father's parental rights protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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## OPINIONS BELOW

The decision of the Oregon Supreme Court originated in a Supplemental Judgment of Jackson County Circuit Court (trial court), rendered August 19, 2004; it is unreported and part of the trial court file. Appdx. A at page 1-a. The decision is in the file of the Jackson County (Oregon) Circuit Court. Appdx. A at page 1-a.

The trial court modified its Supplemental Judgment, in a way not material here, with a Corrected Supplemental Judgment, entered May 5, 2006. Appdx. B at page 5-a. It is unreported and in the file of the Jackson County Circuit Court.

The Oregon Court of Appeals affirmed (without opinion) the trial court on December 27, 2006. It is reported at 210 Or App 368, 150 P3d 1115. Appdx. C, at page 9-a.

The Oregon Supreme Court granted Respondent's Petition for Review on June 19, 2007. That is reported at 343 Or 115 162 P3d 988. Appdx.D, at page 12-a.

The opinion of the Oregon Supreme Court was rendered on January 25, 2008 and is reported at 344 Or 1, 176 P3d 388. Appdx. E at page 15-a.

The Oregon Supreme Court denied Petitions for Reconsideration on March 5, 2008. The fact of the denial is reported at 344 Or 1, 176 P3d 388. The text of the denial is not reported. Appendices E (at page 15-a) and F (page 33-a).

## JURISDICTION

This Petition seeks review of the Oregon Supreme Court's decision; it was entered on January

25, 2008. A timely Petition for Reconsideration was filed on February 6, 2008 and denied on March 5, 2008.

This Court's jurisdiction is invoked under 28 USC 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . "

The Fourteenth Amendment to the United States Constitution, Section 1, provides in relevant part that

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

### A. PROCEDURAL OVERVIEW

Petitioner is the father of the parties' son ("M" in the decision of the Oregon Supreme Court). Respondent is the boy's mother. The parties' marriage ended in divorce in 1999.

While custody of M was initially awarded to Mother (in 1999) in the dissolution of the marriage, the trial court modified the decree of dissolution in 2002 so that Father was "awarded sole and legal custody of the child of the parties." (Jackson County Circuit Court Judgment Modifying Decree, October 9, 2002 at 1). Mother appealed that; the modification was affirmed by the Oregon Court of Appeals (Boldt and Boldt (A119754), 203 Or App. 545, 129 P.3d 280 (2005); Mother's petition for review to the Oregon Supreme Court was denied. Boldt and Boldt, 340 Or. 157, 130 P.3d 787 (2006).

## B. TRIAL COURT ACTIONS

Mother moved to modify the decree of dissolution, to change custody from Father to her, in June 2004. The ground urged for modification was that circumcision of the parties' son (then 9) (a) would be unduly dangerous and (b) was not what M wanted. Respondent's "Motion for Order to Show Cause re Modification of Judgment (Custody)," June 4, 2004. Appdx. U at page 108-a. No other grounds were asserted for changing custody from Father to Mother.

In deciding whether to hold a full evidentiary hearing on the Mother's motion, the trial court considered (a) affidavits submitted by the parties, (b) brief telephone testimony of the parties, and (c) legal memoranda of the parties' attorneys.

Mother's affidavit (a) expressed concerns about the safety of the procedure and (b) asserted that M did not want it. Appdx. U: Affidavit of Lia Boldt. She attached to it a 28 page Australian law review article (Journal of Law and Medicine, Volume

7, February 200, "Circumcision of Healthy Boys: Criminal Assault?").

Father had converted to Judaism (Conservative) in May 2004. A tenet of his faith is to raise his child as Jewish. For males, this includes circumcision. Father thus intended to have M circumcised, primarily for religious reasons and secondarily for medical reasons.

Father submitted affidavits saying that (a) Father is obligated, as a Jew, to raise his child as Jewish and (b) circumcision is necessary for a boy's conversion to Judaism. Affidavit of James H. Boldt (June 8, 2004), affidavit of Steve McConnell (Vice President and next President of the synagogue where Father attends and is a member, Congregation B'Nai Torah; June 8, 2004), affidavit of Len Albert (synagogue member and prayer leader; founder and most recent past president of Congregation B'Nai Torah; 6-3-04), and affidavit of Laurence Perrin (June 4, 2004).

Among the eight affidavits Father submitted to the Trial Court was one from Michael Ellen, M.D., a board-certified urologist, licensed to practice medicine in the state of Washington. He is also a member of the Northwest Urology Society and of the American Society of Clinical Urologists. He was then currently Chairman of the Division of Surgery at Providence St. Peter Hospital [in Olympia, Washington]. Dr. Ellen found that:

A. Circumcision would be a safe procedure for the child, with no significant risk of complications;

B. Circumcision results in greatly reduced risks of penile cancer and of some infections (such as ballanitis);

C. There will be no health detriment to the child

from a circumcision.

D. There is evidence of glanular adhesions which should have disappeared by age three. This alone is cause for recommendation for the procedure.

E. He envisions performing the procedure under local anesthetic.

F. The procedure itself will be painless (with some minor discomfort for about three days afterward but not enough to preclude him from going to school or participating in most normal daily activities).

Affidavit of Michael Ellen, M.D. (June 7, 2004).

Two other physicians, Len Albert, M.D., and Larry Perrin, M.D. (both licensed to practice medicine in the state of Washington) submitted affidavits concluding that:

A. Numbing agents are used to insure that the procedure itself is without pain. There may be some minor discomfort for about three days after the procedure---but nothing that would preclude M attending school or carrying on most of his normal daily activities. After that, they anticipate no discomfort at all.

B. The procedure does not require hospitalization or general anesthesia. It can easily be done in Dr. Michael Ellen's office.

C. Medically, there is no 'downside' to being circumcised. Apart from the religious reason for the procedure, there are also significant medical reasons favoring the operation as well. Specifically, (a) the rate of penile cancer in circumcised males is many times lower than it is in uncircumcised males, and (b) the rate of certain infections (such as ballinitis) is much lower in circumcised males than it is in uncircumcised males. Affidavit of Len Albert, M.D. at 1 and 3 (June 3, 2004); Affidavit of Larry Perrin,

M.D. at 2-3 (June 4, 2004).

Father submitted affidavits that the boy wanted to have the circumcision as part of his planned conversion to Judaism. Affidavits of James H. Boldt (June 8, 2004) , Cheryl Boldt (June 8, 2004), Jacob Boldt (child's brother, then 16; June 8, 2004), and Dr. Ellen.

Father also submitted affidavits showing that M is active in Jewish observances, rituals, and synagogue school (at Congregation B'Nai Torah). Affidavits of James H. Boldt (June 8, 2004), Sheryl Shulman (M's synagogue school teacher and director; June 4, 2004), Cheryl Boldt (June 8, 2004), and Jacob Boldt (June 8, 2004).

In denying Mother's motion for Order to Show Cause to change custody, the Trial Court explained that "The court finds, in reviewing the affidavits submitted, that the custodial parent's intention of having the minor son of the parties circumcised is insufficient grounds for an order to show cause for a change of custody." Supplemental Judgment (Appdx. A) of August 19, 2004 at 3-a.

Regarding the authority to decide about having the parties' son circumcised, the Trial Court ruled that "The court finds that the decision whether or not to circumcise the child is a decision properly made by the custodial parent." Supplemental Judgment of 8-19-04 (Appdx. A at 2-a).

However, the Trial Court also ruled that Father could not have the boy circumcised until after the appeal of the modified custody award (which was then still pending) was concluded. The Trial Court later (on Mother's motion) extended the stay on Father having the boy circumcised until after any appeal by Mother (through the Oregon appellate

courts) of the Trial Court's decision on the circumcision (motion to change custody). Corrected Supplemental Judgment (Appdx. B at 7-a).

## C. OPINION OF OREGON SUPREME COURT

The Oregon Supreme Court extended the stay on Father having the boy circumcised for two weeks: "Subject to further order of the trial court, the trial court's stay enjoining the parties from having M circumcised is extended until 14 days from the date of the appellate judgment." Order Denying Petitions for Reconsideration and Extending Stay (Appdx. F, at 33-a), March 5, 2008. As of that date (March 5, 2008) the "Appellate Judgment" had not been entered.

In its opinion, the Oregon Supreme Court essentially held that:

1. The decision on whether to have a minor son circumcised is a parental decision (despite any alleged medical risk); specifically:

> "We conclude that, although circumcision is an invasive medical procedure that results in permanent physical alteration of a body part and has attendant medical risks, the decision to have a male child circumcised for medical or religious reasons is one that is commonly and historically made by parents in the United States." Appdx. E, 28-a-29-a.

2. A decision on circumcision of a boy is generally for the custodial parent to make; as the non-custodial parent, Mother's opposition to the circumcision is not legally significant; specifically:

> "We also conclude that the decision to circumcise a male child is one that generally

falls within a custodial parent's authority, unfettered by a noncustodial parent's concerns or beliefs-medical, religious or otherwise. Were mother's concerns or beliefs regarding circumcision all that were asserted in the affidavits in this case, we would conclude that mother did not carry her initial statutory burden to demonstrate a sufficient change in circumstances demonstrating father's inability to properly care for M." Appdx. E, 29-a.

3. The Trial Court nevertheless erred in not interviewing M to see what his position on the contemplated circumcision is; specifically:

"In our view, at age 12, M's attitude regarding circumcision, though not conclusive of the custody issue presented here, is a fact necessary to the determination of whether mother has asserted a colorable claim of a change of circumstances sufficient to warrant a hearing concerning whether to change custody. That is so because forcing M at age 12 to undergo the circumcision against his will could seriously affect the relationship between M and father, and could have a pronounced effect on father's capability to properly care for M. See Greisamer, 276 Or. at 400, 555 P.2d 28 (illustrating proposition). Thus, if mother's assertions are verified the trial court would be entitled to reconsider custody. As to that inquiry, however, we think that no decision should be made without some assessment of M's true state of mind." Appdx. E, 29-a.

4. The Oregon Supreme Court directed the trial court to find out (directly) what M's position on the contemplated circumcision is. Specifically:

> "We remand the case to the trial court with instructions to resolve the factual issue whether M agrees or objects to the circumcision." Appdx. E, 30-a.

5. If the Trial Court decides that M agrees with the contemplated circumcision, Mother's motion is to be dismissed [and thus Father would be allowed to have M circumcised]. If M is opposed to the circumcision, then the Trial Court is to decide whether to (a) continue custody as it is [thus in effect allowing Father, as the custodial parent, to have M circumcised], (b) condition Father's continued custody of M on not having him circumcised, or (c) changing custody from Father to Mother. Specifically:

> "If the trial court finds that M agrees to be circumcised, the court shall enter an order denying mother's motions. If, however, the trial court finds that M opposes the circumcision, it must then determine whether M's opposition to the circumcision will affect father's ability to properly care for M And, if necessary, the trial court then can determine whether it is in M's best interests to retain the existing custody arrangement, whether other conditions should be imposed on father's continued custody of M, or change custody from father to mother." Appdx. E, 30-a.

Father raised the issue of the constitutionally protected parental rights (the right of a parent (exercised through the custodial parent)---rather

than the state---to decide such matters. Appdx. Q at 71-a through 78-a and 95-a-96-a).

Father also raised the issue of Freedom of Religion under the First Amendment---that it is a violation of the Free Exercise Clause for the state to prohibit, limit, or burden a parent's decision on such a surgical procedure (a) with primarily a religious motivation (though also medically recommended by M's urologist), that is (b) not prohibited by any law. Appdx. Q at 78-a to 96-a).

The Oregon Supreme Court, while acknowledging that Father had raised these Constitutional issues (Appdx. E at 19-a, 21-a, and 27-a-28-a), did not address them in its opinion. Appdx. E.

Father again raised the issues of violation of constitutionally protected parental rights and freedom of religion in a Petition for Reconsideration, pursuant to Oregon Rule of Appellate Procedure 9.25, on February 6, 2008 (Appdx. S at 97-a-107-a). The Oregon Supreme Court did not address either issue in its March 5, 2008 denial of Reconsideration. Appdx. T at page 33-a.

## REASONS FOR GRANTING THE PETITION

### A. OVERVIEW

This Court has emphasized the importance of the Free Exercise Clause of the First Amendment to the United States Constitution. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 US 520, 124 LEd 2d 472, 113 S Ct 2217 (1993). The Court has also ruled that parental rights in raising children are of Constitutional stature (14th

Amendment Due Process Clause). Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). When both such rights on involved (a "hybrid" case), the Court has subjected governmental actions to heightened scrutiny. State of Wisconsin v. Yoder, 406 US 205, 32 L Ed 2d 15, 92 S Ct 1526 (1972) . The decision of the Oregon Supreme Court has seriously undermined both of these rights; the ramifications of the decision reach far beyond violation of Jewish parental decision-making regarding circumcision of minor sons.

## B. INFRINGEMENT ON PARENTAL DECISION-MAKING

### 1. Custodial Parent is Decision-Maker for the Child

In applying a parent's Constitutional right to raise his or her child, in the context of divorced parents, that decision-making right devolves upon the custodial parent.

As noted above in the Statement of the Case, the Oregon Supreme Court itself essentially recognized this, writing:

> "We also conclude that the decision to circumcise a male child is one that generally falls within a custodial parent's authority, unfettered by a noncustodial parent's concerns or beliefs-medical, religious or otherwise." (Appdx. E, 29-a)

This accords with the common conception of "custody" across the country. "The essence of custody of a child of former spouses is the companionship of the child and the right to make decisions regarding

the child's care and control, education, health and religion." 27C CJS, Divorce, sec. 618-a, n. 98.

To the same effect, is 24A AmJur 2d Divorce And Separation, sec. 930, nn. 91 and 92:

> "The essence of custody is the companionship of the child and the right to make decisions regarding his care, control, education, health, and religion. The custodian may determine the child's upbringing, including his or her education, health care, and religious training, without involvement by the court, unless there is a danger to the child's physical health or emotional development."

An example is Feldman v. Feldman, 378 NJ Super 83, 874 A2d 606 (2005), wherein the Court held, in a joint custody situation (also involving a conflict between a Jewish father with primary physical custody and a non-Jewish mother): "The law is clear that the primary caretaker has the right to determine the religious upbringing of the children in his or her charge." (at 874 A2d 611).

2. Parental Rights Constitutionally Protected

In Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), this Court held that parental rights to raise their children are constitutionally protected. The Court offered important guidance on the constitutional stature of parental rights in decision-making about their children:

> "The Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of law.' We have long recognized that the

Amendment's Due Process Clause, like its Fifth Amendment counterpart, 'guarantees more than fair process.' **2060 *Washington v. Glucksberg,* 521 U.S. 702, 719, 117 S.Ct. 2258 (1997). The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' *Id.,* at 720, 117 S.Ct. 2258; see also *Reno v. Flores,* 507 U.S. 292, 301-302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

The liberty interest at issue in this case --the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court. . . . in *Pierce v. Society of Sisters,* 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), we again held that the 'liberty of parents and guardians' includes the right 'to direct the upbringing and education of children under their control.' . . . *Id.,* at 535, 45 S.Ct. 571. . . .

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, *e.g., Stanley v. Illinois,* 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) ('It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' (citation omitted)); *Wisconsin v. Yoder,* 406 U.S. 205,

232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); . . . *Parham v. J. R.,* 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) ( 'Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course'); *Santosky v. Kramer,* 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (discussing '[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child'); *Glucksberg, supra,* at 720, 117 S.Ct. 2258 ('In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ [t] ... to direct the education and upbringing of one's children' (citing *Meyer* and *Pierce*)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." 530 US at 65-6666 (emphasis supplied).

While the opinion of the Court in Troxel was technically a plurality (of four Justices), concurring opinions by Justices Souter and Thomas make it evident that the central reasoning of the Court is supported by a full majority.

Justice Souter thought it enough to simply affirm the Washington Supreme Court, noting that its decision was consistent with the U.S. Supreme Court's opinions on substantive due process. He

added, though that:

> "We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment. [citations omitted" 530 US at77.

Justice Thomas, while he would have expressly applied a strict scrutiny standard of review to such "infringements of fundamental rights," did fully agree with the four Justices representing the opinion of the Court. 530 US at 80.

In Troxel, the Court, it is submitted, did not address the issue because large numbers of people would be specifically affected (Washington grandparents of a deceased parent suing for visitation rights). Rather the Court was providing guidance to every court and legislative body, in every state, on the permissible Constitutional limits or conditions on the right of parents to make decisions regarding their children---and providing for "heightened protection against government interference with certain fundamental rights and liberty interests." Similar considerations apply here.

The instant case presents (though in a quite different context) a question that should be governed by the principles of Troxel---but a question that only this Court can authoritatively decide: can a state (acting through its court) (a) require that a court first ascertain the child's view and then (b) substitute its opinion, for that of a parent with sole and legal custody, (c) about a minor medical procedure that is medically recommended, and that no law prohibits, limits, or conditions?

3. Oregon Court's Decision Violates Parental Rights

As noted above, this Court has recognized Constitutionally protected parental rights---including the right to make decisions about their children. Even the Oregon Supreme Court that " . . .the decision to have a male child circumcised for medical or religious reasons is one that is commonly and historically made by parents in the United States." Appdx. E, 28-a-29-a.

So, why not simply let the custodial parent make that decision? The Oregon Supreme Court---without even addressing Father's claims of protection of the Free Exercise Clause and 14th Amendment Due Process Clause Constitutionally protected parental decision-making rights---simply concluded that the trial court must first ascertain the child's view. However, never before, in the Oregon Supreme Court's 148 year history, has it ever required that a trial court ascertain the position of the child on any legal, medically recommended surgical procedure---nor indeed on any decision of a custodial parent on anything.

The Oregon Supreme Court directed the Trial Court to "determine" the wishes of the child. After that, the Trial Court may (a) dismiss Mother's motion to change custody or (b) inquire further and (1) continue custody in Father, (2) condition Father's custody (forbidding the circumcision), or (3) *entirely remove custody of Father and change it to Mother.* The record in the case (primarily affidavits and some very brief telephone testimony of the parties) evinces no parental unfitness of Father. The sole grounds urged by Mother for the motion for change of custody is that Father intended to have the parties' son

circumcised. *Infra*, Statement of the Case: Trial Court Actions; Appdx. U, 108-a.

4. Wider Ramifications of the Error

In the future, if the Oregon Supreme Court's opinion is not reversed, then a custodial parent would risk losing custody of his or her son---for simply *wanting* to have him circumcised. This is reason enough to reverse the decision of the Oregon Supreme Court---but the ramifications of the decision go far beyond that context.

The far-reaching implications of the Oregon Supreme Court's opinion extend, with no apparent limit, to other areas of parenting---indeed to any other area of parenting where a court (in the absence of any statute) thinks that a child's view should be ascertained before a parent can make a decision about the child, with the final decision left not to the parent, but to the state (acting through a court).

The mischief this creates can take many forms --- such as the necessity of getting a 12 (or 13 or 14) year old's opinion---and then waiting for a judge to make a decision about:

(a) having a wisdom tooth extracted (a permanent physical alternation of a body part with some medical risk),

(b) having a tonsillectomy (a permanent physical alternation of a body part with some medical risk---indeed as the Oregon Supreme Court *amici* American Jewish Congress, American Jewish Committee, Anti-Defamation League, and Union of Orthodox Jewish Congregations of America pointed out in its brief to the Oregon Supreme Court (page 25, note 18) the mortality rate for tonsillectomies,

while extremely low, is *15 times* the mortality rate for male circumcisions);

These procedures of course are performed on girls as well as boys. Each procedure might be deemed "elective" in the sense that they are not typically imminently necessary to stop a life-threatening condition. Each might be (given the opinion of the Oregon Supreme Court) the subject of objection (and a motion to change custody) by a non-custodial parent.

The Oregon Supreme Court has offered no principled, intellectually defensible, legally supported reason to distinguish these other procedures from that of circumcision of a minor male that is deemed not only safe but medically recommended by a board certified urologist who has actually examined the child. The Court is, in effect, substituting its judgment---not only for the Trial Court (which has had extensive experience with these parties and this child) but also for the custodial parent.

Parental decision-making with which a child might disagree is certainly not limited to surgical procedures. For examples:

(c) sending the child to a private religious high school; while not a physical alteration, it is highly likely to affect the child's views of morality, the Deity, and social issues---in a long term way---and probably far more important to a boy's future than whether he is circumcised; it is irreversible in the sense that, once completed, the child cannot undo it;

(d) whether a 14 year old boy plays high school football (more risky than a circumcision); it is irreversible in that, once he plays for four years (or

does not play), there is no chance to undo that decision later;

(e) should a 14 year old child take N.R.A. gun safety lessons? Once taken, such lessons cannot be 'untaken.' There is arguably be some small safety concern (although safety considerations may also arguably support taking the course);

(f) applying for a driver's permit and/or license (and taking the behind-the-wheel test) is certainly an important step, with potentially serious consequences; is the proper age in a given case 15? 16? 17?

(g) should a 13 year old boy be in Boy Scouts? Some parents have strong feelings (pro and con). It is an organization whose very purpose is in part to inculcate certain values, perspectives, and attitudes in its members. It is irreversible in the sense that, after age 18, a boy can no longer be a member---and if he is a participating member, his experiences (good or bad) cannot be 'undone.'

(i) studying abroad for a semester in high school---in China; it cannot be 'undone';

Must the custodial parent henceforth get the court's permission before implementing decisions about such matters---because the non-custodial parent *claims* that the child *told* him or her that the child opposes the decision of the custodial parent? If the 13 year old says, for example, "I don't want my wisdom tooth out," must the trial judge then set a full-blown evidentiary hearing to revisit the whole issue of custody?

The decision of the Oregon Supreme Court represents a wholesale inroad into Constitutionally protected parental rights.

## C. VIOLATION OF FREE EXERCISE OF RELIGION

### 1. Constitutional Requirements

In Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 US 520, 124 LEd 2d 472, 113 S Ct 2217 (1993) the Court decided a case involving the conflict between religiously motivated conduct and a law. The City Council (in Florida) had adopted ordinances that prohibited animal sacrifice.

The Church filed a 42 USC 1983 action in U.S. District Court, seeking declaratory, injunctive, and monetary relief, based on a Free Exercise challenge.

In reversing the District Court and the Court of Appeals, in favor of the church, this Court explained the religious context:

> "The sacrifice of animals as part of religious rituals has ancient roots. See generally 12 id., at 554-556. Animal sacrifice is mentioned throughout the Old Testament, see 14 Encyclopaedia Judaica 600, 600-605 (1971), and it played an important role in the practice of Judaism before destruction of the second Temple in Jerusalem, see id., at 605-612. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son. See C. Glasse, Concise Encyclopedia of Islam 178 (1989); 7 Encyclopedia of Religion, supra, at 456." 508 US at 524-525.
>
> Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. . . .

. See 723 F. Supp. at 14711472; 13 Encyclopedia of Religion, supra, at 66; M. Gonzalez-Wippler, The Santeria Experience 105 (1982). 508 US at 524-525.

The Court held, *inter alia*, that mere facial neutrality in a law is insufficient by itself to withstand a Free Exercise challenge:

> "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality,' Gillette v. United States, 401 U.S. 437,452,28 L. Ed. 2d 168,91 S. Ct. 828 (1971), and 'covert suppression of particular religious beliefs,' Bowen v. Roy, supra, at 703 (opinion of Burger, C. J.)." 508 US 534.

The Court noted the disparate effect on the plaintiff church and its members: "It is a necessary conclusion that almost the only conduct subject to Ordinances 87-40,87-52, and 87-71 is the religious exercise of Santeria church members. 508 US at 535. "The Court emphasized that a disparate impact of a facially neutral law on a religious practice triggers strict scrutiny:

> "To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests. McDaniel v. Paty, 435 U.S. at 628, quoting Wisconsin v. Yoder, 406 U.S. 205, 215, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972). The compelling interest standard that we apply once a law fails to meet the Smith requirements is not "water[ed] ... down" but "really means what it

says." Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. at 888. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.." 508 US at 546 (emphasis supplied).

In Lukumi Babalu Aye, the Court, it is submitted, did not address the issue because large numbers of people would be specifically affected (Santeria church members, practicing animal sacrifice, in the city of Hileah, Florida). Rather the Court was providing guidance to every court and legislative body, in every state, on the permissible---and narrow---limits of even facially neutral laws that infringe on the First Amendment Free Exercise Clause by limiting a religious practice. Similar considerations apply here.

The instant case presents (though in a quite different context) a question that should be governed by the principles of Lukumi Babalu Aye---but a question that only this Court can authoritatively decide: can a state (acting through its court) deny the right of a parent with "sole and legal custody" to have his or her minor son circumcised, when (a) the primary reason is religious, (b) the procedure is medically recommended, (c) no law (or divorce decree) prohibits, limits, or conditions the procedure?

2. Oregon Ruling Ignores This Court's Requirements

Another paradigm for analysis of First Amendment Free Exercise cases was formulated by the United States Supreme Court in Lemon v.

Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971):

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926, 20 L.Ed.2d 1060 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' Walz, supra, at 674, 90 S.Ct., at 1414."

The Oregon Supreme Court's holding, however, fails the Lemon test---in all three ways:

1. There is no legislative purpose at all; there has been *no* legislative enactment prohibiting, limiting, or conditioning the medically recommended circumcision of a boy by a physician---in any state in the union.

2. The primary effect of the ruling does indeed inhibit religion---a particular religion: Judaism, whose tenets command that boys be circumcised. There is no other religion (other than, to some extent, Islam, that commands circumcision of males, mentioned in Respondent on Review's Oregon Supreme Court brief on the merits at 15-16).

The very nature of the Court's ruling is aimed, in effect (though perhaps not intent) at a *Jewish* religious practice. Presumably, if the procedure were undertaken for a secular (medical) reason, the Oregon Supreme Court would not have ruled the way it did. This inhibition of the Jewish religion is

squarely within what Lemon says government cannot do.

3. Lemon also mandates that the challenged action not "foster "an excessive government entanglement with religion"---yet that is just what the Oregon Supreme Court's ruling does---or at least invites.

The Trial Court must "determine" whether to (a) keep custody as it is and allow the circumcision to go ahead, (b) impose "conditions" on Father's custody, or (c) change custody from Father to Mother. The Trial Court will necessarily be called upon to wrestle with considerations of (a) the role of Judaism in the child's life (as well as the Father's), (b) the relationship of the Father and the child (which is inextricably intertwined with the Father's---and the boy's---practice of Judaism, for he is, as the record shows and has never been questioned by the Mother, deeply involved in that), (c) the relative importance of the primary reason for the circumcision (religious), (d) the reasons the child may or may not agree with the circumcision, etc.

It is an open---and virtually unavoidable---invitation to do exactly what Lemon proscribes: foster an excessive entanglement with religion.

### 3. Disproportionate Effect on Jewish Custodial Parents

#### (a) Circumcision: Practice and Law

A majority of boys in the United States are circumcised. As Petitioner noted in his brief on the merits to the Oregon Supreme Court (at 16):

"The National Center for Health Statistics reports (for the latest year in which published data are available at the N.C.H.S.) that the per cent of males circumcised in the United States in 2004 was 57.4%. http://www.cirp.org/library/statistics/USA/: circumcision incidence rate: all regions. [accessed 9-10-07]"

Doctors Opposing Circumcision, the amicus curiae aligned with Mother in the Oregon Supreme Court, reports the rate at 55%, though no source was given for the statistic. D.O.C. br. at 13.

(b) Importance of Circumcision in Judaism

The Encyclopaedia Judaica (Keter Publishing House, Jerusalem, 1982, with current updates) summarizes (in vol. 5, under Circumcision) the importance of ritual circumcision in Judaism:

"The promise that Abraham's seed should inherit the land of Canaan was bound up together with this covenant. The punishment for failure to observe this command was *karel,* to be "cut off" from one's kind *(ibid* 21 : 4), understood by the rabbis to mean "excision at the hand of heaven from the community." This commandment is considered so important that the rabbis declared (Shab. 137b) that were it not for the blood of the covenant, heaven and earth would not exist. Abraham was said to have circumcised himself on the tenth of Tishri, the day later celebrated as the Day of Atonement, when the sins of the people are forgiven (PdRE 29)." (pp. 567-568) . . .

Laws. It is a Jewish father's duty to have his

son circumcised (Sh. Ar., YD 260:1)." (p. 570). . . .

Spinoza declared that the practice of this rite was alone sufficient to ensure the survival of the Jewish people (*Tractatus Theologico-Politicus (1670), 3:53)* . . . Its influence on Jewish life throughout the ages has been so strong, that its observance is often the sole remaining token of affinity with Judaism even after intermarriage, when the Jewish parent insists on the circumcision of the sons. (p. 575)

In the context of conversion, The New Encyclopaedia of Judaism (New York University Press, 2002), informs us that:

"It is also performed upon male converts to Judaism as a sign of their entrance into that covenant." (Circumcision entry at 172) . . . Circumcision is an essential part of conversion to Judaism for males, though if the convert is already circumcised, a ritual drawing of a drop of blood from the site of the circumcision is performed. (Circumcision entry at 173)

A Guide to Jewish Religious Practice (by Rabbi Isaac Klein, with supplement by Rabbi Joel Roth of The Jewish Theological Seminary of America, Ktav Publishing House, 1992) explains the significance of the rite and adds that it is required for conversion of males. (at 442-443). A Jewish physician may perform it. (at 427). It is an obligation of the father to have his son circumcised. (at 426). The Guide further explains:

The rite of circumcision is cardinal in Judaism. According to the Bible, it is the sign of the covenant between God and the Jewish people, which began with Abraham (Gen. 17:9-

> 13). . . . to the Jew it has always had a religious significance. It is the indelible mark of his Jewishness. (at 421).

(c) Effect on Jewish Parents

While the Oregon Supreme Court's decision does not expressly single out Jewish custodial parents, implicitly, it does just that.

This Court has held that a facially neutral statute violates the First Amendment when it is applied to a religiously motivated action absent a compelling state interest. In Thomas v. Review Bd., Ind. Empl. Sec. Div., 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), the appellant, employed in a foundry, refused to work on the building of armaments, as it was against his religion. Following refused requests to be laid off, he quit. His application for unemployment benefits was denied, which was upheld by the state supreme court. This Court reversed, instructing that:

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." (at 717-718)

Analogously, in the instant case, the Oregon Supreme Court's opinion forces Father to choose between following the precepts of his religion and

risk forfeiting custody of his child, on the one hand, and abandoning one of the precepts of his religion in order to be sure of keeping custody of his child, on the other hand.

A difference, of course, from Thomas, is that the choice that is forced on Father is much more severe: not missing a few weeks of unemployment benefits but risking losing custody of his child.

The Thomas Court further cautioned that:

> "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." Wisconsin v. Yoder, supra, 406 U.S., at 215, 92 S.Ct., at 1533." (at 718; emphasis supplied).

What compelling state interest is there---or has there ever been held to be---in prohibiting, delaying, or conditioning a Jewish parent's right to a religious ritual that (a) has been practiced for 3,500 years, (b) is performed (for perhaps largely secular reasons) on the majority of boys in the United States, (c) is medically recommended, and (d) no law prohibits?

Such a limitation could not even be sustained on a rational basis test, in view of the Free Exercise rights involved.

4. Wider Ramifications of the Error

The ruling of the Oregon Supreme Court is that if a non-custodial parent *says* that a boy does not agree with a circumcision contemplated by the custodial parent (even though religiously motivated, medically recommended, and neither prohibited, limited, nor conditioned by any law) then the parent with "sole and legal custody" cannot himself or herself make the decision; the *court* must first determine the boy's views and then the *court* makes the decision. The decision may include depriving the custodial parent of custody---simply because he wanted to have the boy circumcised.

That premise lends itself to yet more disturbing---and Constitutionally impermissible--- results. What if the boy is 10 instead of 12? or eight or four or two? or a newborn? If, as the Oregon Supreme Court appears to hold, a boy has a right to be heard before the decision is made, then why should the right be age dependent (for the results of a circumcision are irreversible regardless of the age it is performed)? Perhaps a guardian ad litem might be appointed (by the court) for the newborn, to express the 'views' of the infant boy. The decision would thus be made by a non-parent (a judge) after hearing the views of another non-parent adult, speaking 'for' the child.

And what if that child says he (or she) does not want to go to synagogue school? Or the child of a Roman Catholic custodial parent says he or she does not want to go to Catholic school? The same applies to any child sent by the parent to a religious school--- or even a secular private school. Under the reasoning of the Oregon Supreme Court, the *court* would decide, after hearing from the child.

And what about confirmations? Baptisms? Confessions? Summer Solstice (significant in some religions, including Wiccan)? Attendance at church, synagogue, or mosque? A religious youth group?

The Oregon Supreme Court's holding provides no principled, intellectually defensible, legally supportable means of distinguishing these kinds of situations from deciding about the circumcision of a 12 or 13 year old boy.

## D. PARENTAL RIGHTS AND FIRST AMENDMENT TOGETHER: HEIGHTENED SCRUTINY

### 1. Combined Rights: This Court's Holdings

This Court established the decisional paradigm for conflicts between (a) religious practices coupled with Constitutional rights of parenting and (b) facially neutral state regulation in State of Wisconsin v. Yoder, 406 US 205, 32 L Ed 2d 15, 92 S Ct 1526 (1972):

> " . . . when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." (406 US 233; emphasis added).

Quoting that exact language, this Court reaffirmed (at least inferentially) the stricter scrutiny applied to governmental limitations on such "hybrid" claims (Free exercise and another Constitutional right) in Employment Division, Department Of Human Resources Of Oregon v.

Smith, 494 U.S. 872, 882, 110 S.Ct. 1595, 1602, 108 L.Ed.2d 876, 58 (1990).

Smith upheld the denial of state unemployment benefits to claimants who had been terminated from employment for use of peyote. Claimants' use of the hallucinogenic drug was both (a) a part of their religion (Native American Church) and (b) a violation of the criminal law of the state.

Ruling against the claimants, Court held specifically that

> "Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug." 494 U.S. 890, 110 S.Ct. 1606.

The Court held that, for such a prohibition, the state need not justify the restriction by a compelling governmental interest.

The Court contrasted the peyote-using claimants' position with hybrid (Free Exercise coupled with another Constitutional right) cases, holding that "The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right." 494 U.S. 882, 110 S.Ct. 1602.

The Court indeed emphasized the special protections afforded to such hybrid claims:

> "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other

> constitutional protections, such as freedom of speech and of the press . . . . . or the right of parents, acknowledged in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children, see Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) . . . *882 Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); West Virginia Bd. of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (invalidating**1602 compulsory flag salute statute challenged by religious objectors)."

The Court's reliance on Barnette sheds futher light on the stricter scrutiny applied to First Amendment claims combined with Fourteenth Amendment claims---significant because the case at bar is just such a claim (in the Smith parlance, a "hybrid" claim).

In West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 1186, 147 A.L.R. 674, 87 L.Ed. 1628, 1638 (1943) was a suit by Jehovah's Witnesses to enjoin enforcement of public school board rule requiring children to salute the U.S. flag even though that was contrary to their religious beliefs ("Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that

is in the water under the earth; thou shalt not bow down thyself to them nor serve them.' They consider that the flag is an 'image' within this command. For this reason they refuse to salute it." 319 U.S.639, 63 S.Ct. 1181).

> "The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. . . . The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." (emphasis added).

In Yoder, the Court, it is submitted, did not address the issue because large numbers of people would be specifically affected (Wisconsin Amish parents, with 14 and 15 year old children, opting to keep them out of high school). Similarly, in Barnette, it is submitted, the Court did not take up the issue because large numbers of people are Jehovah's Witnesses, residents of West Virginia, who had children in public schools, and objected to having their children salute the flag. Rather the Court was providing guidance to every court and legislative body, in every state, on the permissible limits of even facially neutral state requirements that infringed on both the Free Exercise clause and the Due Process liberty clause that protects the right of parents to

direct the upbringing of their children. Similar considerations apply here.

The instant case presents (though in a quite different context) a question that should be governed by the principles of Yoder and Barnette---but a question that only this Court can authoritatively decide: can a state (acting through its court) deny the right of a Jewish custodial parent to have his or her minor son circumcised, when (a) the primary reason is religious, (b) the procedure is medically recommended, (c) no law (or divorce decree) prohibits, limits, or conditions the procedure?

As noted supra, the Oregon Supreme Court's decision was premised on its opinion that

> ". . . at age 12, M's attitude regarding circumcision, though not conclusive of the custody issue presented here, is a fact necessary to the determination of whether mother has asserted a colorable claim of a change of circumstances sufficient to warrant a hearing concerning whether to change custody." (emphasis added).

There was a faint foreshadowing of this Court's view of requiring a governmental determination of a child's view of a parental decision before the parent can implement it in Yoder; apropos to the case at bar, it was a prescient observation:

> "The State's argument . . . appears to rest on the potential that exemption of Amish parents from the requirements of the compulsory-education law might allow some parents to act contrary to the best interests of their children by foreclosing their opportunity to make an intelligent choice between the Amish way of life and that of the outside world. The same

> argument could, of course, be made with respect to all church schools short of college. There is nothing in the record or in the ordinary course of human experience to suggest that non-Amish parents generally consult with children of ages 14-16 if they are placed in a church school of the parents' faith." 406 US 232.

Other courts, since Smith, have relied on it (and Yoder), reaching the same conclusion urged here---that a heightened scrutiny, and a compelling governmental interest, is required in hybrid cases involving both Free Exercise rights and the right to parent. Shepp v. Shepp, 588 Pa. 691, 906 A2d 1165 (2006) (speaking favorably to a child about polygamy, a crime, cannot be prohibited to a parent, absent a grave threat of harm to the child); Diana H. v. Rubin, 217 Ariz. 131, 171 P3d 200 (Ariz. App, Div. 2, 2007) (even as to dependent child, a ward of the court, the state cannot immunize child against will of the parent; no compelling governmental interest shown); In The Matter Of Baby "K", 832 F. Supp. 1022 (E.D. Vir., 1993) (hospital could not withdraw ventilator treatment of incurable and permanently unconscious infant when parent objected, in part for religious reasons).

2. Importance of This Court Deciding the Issue

The holding of the Oregon Supreme Court substantially limits, conditions, and burdens---and may even prohibit altogether---the right of a custodial parent to have his or her son circumcised, even when the procedure is religiously motivated, medically recommended, and neither prohibited,

limited, nor conditioned by any statute. Indeed *no statue of any state* limits, burdens, or conditions such right.

There is no other reported case in the annals of American judicial history that prohibits, limits, or conditions a medically recommended circumcision of a minor male by either his parents or the parent with sole and legal custody of him.

The Oregon Supreme Court's decision seriously undercuts the Constitutionally protected right of parental decision-making---for all custodial parents (and indeed for all parents).

The decision has the clear effect of substantially hindering the First Amendment Free Exercise right of Jewish custodial parents in particular.

Only this Court can authoritatively address this convergence of its First Amendment Free Exercise and 14th Amendment Due Process parental rights jurisprudence. As indicated above, the ramifications of this case go far beyond the case itself. The serious erosion of parental rights and the freedom of religion by the state have national implications, affecting all religions and potentially all parents.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

James H. Boldt [admitted to Court as J. Harlan Boldt], Attorney for Petitioner; Counsel of Record

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[court seal] [stamped filing date: 04 AUG 19]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF JACKSON

In the Matter of the Marriage of:

JAMES H. BOLDT

Petitioner,

and

LIABOLDT,

Respondent.

No. 98-2318-D(3)

SUPPLEMENTAL JUDGMENT CONDITIONING PETITIONER'S CONTINUED CUSTODY OF MINOR CHILD TO STAY CIRCUMCISION PROCEDURE

THIS MATTER CAME before the court upon the motion of the Respondent for an order changing the custody of the minor child from the Petitioner to the Respondent, or in the alternative for an order conditioning the Petitioner's continued custody by prohibiting him from having the minor child, Mikhail, age nine, circumcised. On the court's own motion the parties were further directed to brief for the court the issue of its continuing jurisdiction, and its authority to grant the requested relief. The parties presented briefs and affidavits, and the matter was heard by telephone hearing on Friday,

June 11,2004. The Petitioner represented himself; the Respondent was represented by her attorney, Clayton C. Patrick.

After hearing the arguments of the parties, and considering all of the pleadings, briefs and affidavits filed herein, the court makes the following Findings:

1. The court has continuing jurisdiction over this matter pursuant to ORS 109.744(l)(a).

2. Although the court changed custody from the Respondent to the Petitioner by judgment entered October 10,2002, two appeals are still pending at the Court of Appeals, one by the Petitioner

[end of page 1 in original]

appealing this court's denial of a change of custody in 2001, and one by the Respondent appealing the 2002 change of custody. It will be some time before those appeals are concluded, and the question of which parent should have custody of the child is finally resolved.

3. The court finds that the decision whether or not to circumcise the child is a decision properly made by the custodial parent.

4. However, because a circumcision is an irreversible process, and because it will not be clear which parent will ultimately have custody until the appeals are concluded, the child's best interests and welfare will be best served if the circumcision is deferred until the custody appeals are concluded. This court has the authority to condition an award of custody when it is necessary to protect the best interests or the welfare of the child.

IT IS HEREBY ORDERED AND ADJUDGED that the previous custody judgment entered herein

on October 10,2002, is modified to provide that until the pending custody appeals, Al 16684 and Al 19754, have been concluded, and a final appellate judgment has been issued in those cases pursuant to ORAP 14.05, both parties are hereby enjoined from:

A. having the child of the parties circumcised, except upon further order of the court;

B. taking the child to any mental health professional (such as a psychiatrist, L.C.S.W., psychologist, licensed counselor, etc.) except upon further written order of the court;

C. having any non-emergency surgery performed on the child, except upon further written order of the court.

All other provisions of the October 10,2002, custody judgment remain in effect, except as modified above. When appellate judgments have been issued in the above two appeals, the modifications provided for in this Supplemental Judgment will no longer be of any effect, without the necessity of any further order of this court.

IT IS FURTHER ORDERED that the Respondent's Motion for a Temporary Custody Order and Respondent's Motion for Order to Show Cause (for permanent change of custody) are denied.

[end of page 2 in original]

The court finds, in reviewing the affidavits submitted, that the custodial parent's intention of having the minor son of the parties circumcised is insufficient grounds for an order to show cause for a change of custody.

Dated: August 19, 2004
Hon. Rebecca G. Orf
Judge of the Circuit Court

Submitted by:
CLAYTON C. PATRICK, #77298
1030 S.W. Jefferson St., # 530
Portland, Oregon 97201
503-227-6000
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APPROVED AS TO FORM:
/s/
James Hi Boldt, OSB #76066
Attorney for Petitioner

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[court seal] [date stamp: 06 MAY -5]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF JACKSON

In the Matter of the Marriage of:
JAMES H. BOLDT,
Petitioner,
and
LIABOLDT,
Respondent.

No. 98-2318-D(3)

CORRECTED SUPPLEMENTAL JUDGMENT CONDITIONING PETITIONER'S CONTINUED CUSTODY OF MINOR CHILD TO STAY CIRCUMCISION PROCEDURE

---

THIS MATTER CAME before the court upon the motion of the Respondent for an order changing the custody of the minor child from the Petitioner to the Respondent, or in the alternative for an order conditioning the Petitioner's continued custody by prohibiting him from having the minor child, Mikhail, age nine, circumcised. On the court's own motion the parties were further directed to brief for the court the issue of its continuing jurisdiction, and its authority to grant the requested relief The parties presented briefs and affidavits, and the matter was heard by telephone hearing on Friday, June 11, 2004. The Petitioner represented himself; the Respondent was represented by her attorney, Clayton C. Patrick.

Subsequent to the entry of the Supplemental

Judgment Conditioning Petitioner's Continued Custody of Minor Child to Stay Circumcision Procedure on August 24,2004, it came to the attention of the court that the Supplemental Judgment did not accurately reflect the court's ruling. The court intended the stay of the circumcision procedure included in the judgment to continue until all appeals in the instant case were resolved by appellate judgment, including any appeal which was filed from

[end of page 1 in original]

this Supplemental Judgment itself The court has continuing jurisdiction, despite the matter being on appeal, to correct this error pursuant to ORCP 71A and ORS 19.270(5)(a).

After hearing the arguments of the parties, and considering all of the pleadings, briefs and affidavits filed herein, the court makes the following Findings:

1. The court has continuing jurisdiction over this matter pursuant to ORS 109.744(l)(a).

2. Although the court changed custody from the Respondent to the Petitioner by judgment entered October 10,2002, two appeals are still pending at the Court of Appeals, one by the Petitioner appealing this court's denial of a change of custody in 2001, and one by the Respondent appealing the 2002 change of custody. In addition the Respondent may also appeal this Supplemental Judgment. It will be some time before those appeals are concluded, and the question of which parent should have custody of the child is finally resolved.

3. The court finds that the decision whether or not to circumcise the child is a decision properly made by the custodial parent.

4. However, because a circumcision is an

irreversible process, and because it will not be clear which parent will ultimately have custody until all the appeals are concluded, the child's best interests and welfare will be best served if the circumcision is deferred until all the appeals are concluded. This court has the authority to condition an award of custody when it is necessary to protect the best interests or the welfare of the child.

IT IS HEREBY ORDERED AND ADJUDGED that the previous custody judgment entered herein on October 10, 2002, is modified to provide that until the pending appeals, Al 16684 and Al 19754, and any appeal which is taken from the Supplemental Judgment entered August 24,2004, have been concluded, and a final appellate judgment has been issued in all those cases pursuant to ORAP 14.05, both parties are hereby enjoined from:

A. having the child of the parties circumcised, except upon further order of the court;

B. taking the child to any mental health professional (such as a psychiatrist, L.C.S.W.,

[end of page 2 of original]

psychologist, licensed counselor, etc.) except upon further written order of the court;

C. having any non-emergency surgery performed on the child, except upon farther written order of the court.

Ail other provisions of the October 10, 2002, custody judgment remain in effect, except as modified above. When appellate judgments have been issued in the above appeals, the modifications provided for in this Supplemental Judgment will no longer be of any effect, without the necessity of any further order of this court.

IT IS FURTHER ORDERED that the Respondent's Motion for a Temporary Custody Order and Respondent's Motion for Order to Show Cause (for permanent change of custody) are denied. The court finds, in reviewing the affidavits submitted, that the custodial parent's intention of having the minor son of the parties circumcised is insufficient grounds for an order to show cause for a change of custody.

IT IS FURTHER ORDERED AND ADJUDGED that this Corrected Supplemental Judgment is entered *nuncpro tune* as of August 24, 2004. Dated: *h$& 5*, 2006, *nunc pro tunc* August 24,2004

/s/
Hon. Rebecca G. Orf
Judge of the Circuit Court

Submitted by:
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Portland, Oregon 97201
503-227-6000
Attorney for Respondent
[end of page 3 of original]

Oregon Court of Appeals affirming (without opinion) Trial Court's Corrected Supplemental Judgment: 210 Or App 368, 150 P3d 1115 (12-27-06)

1. Abebe v. Employment Dept., 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017881, , Or.App., December 27, 2006(NO. A131729)
2. Benadom v. State, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017883, , Or.App., December 27, 2006(NO. A127554)
3. Benjamin v. Employment Dept., 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017887, , Or.App., December 27, 2006(NO. A125129)
4. Browder v. Washington, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017889, , Or.App., December 27, 2006(NO. A125181)
5. Crafton v. State, 210 Or App. 368, 150 P.3d 1115 (Table), 2006 WL 4017890, , Or.App., December 27, 2006(NO. A125691)
6. State ex rel. Juvenile Dept. of Lane County v. Dahlberg, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017891, , Or.App., December 27, 2006(NO. A129818)
7. State ex rel. Juvenile Dept. of Josephine County v. Fleming, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017892, , Or.App., December 27, 2006(NO. A124774)
8. State v. Richard, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017895, , Or.App., December 27, 2006(NO. A129001)
9. Mendoza v. Stichler, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017898, , Or.App., December 27, 2006(NO. A132123)
10. Morse v. Liberty Northwest Ins. Corp., 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL

4017901, , Or.App., December 27, 2006(NO. A130832)

**11. In re Marriage of Boldt, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017905, , Or.App., December 27, 2006(NO. A126175)**

12. McQueen v. Driver and Motor Vehicle Services Div. (DMV), a Div. of Dept. of Transp., 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017909, , Or.App., December 27, 2006(NO. A127600)

13. McLenithan v. Lampert, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017911, , Or.App., December 27, 2006(NO. A122743)

14. Neelund v. Josephine County, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017915, , Or.App., December 27, 2006(NO. A133869)

15. State v. Barker, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017917, , Or.App., December 27, 2006(NO. A129363)

16. State v. Huss, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017919, , Or.App., December 27, 2006(NO. A131049)

17. State v. Kling, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017922, , Or.App., December 27, 2006(NO. A117160)

18. State v. Livingstone, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017923, , Or.App., December 27, 2006(NO. A126907)

19. State v. Neri, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017924, , Or.App., December 27, 2006(NO. A121872)

20. State v. Sanchez-Balderas, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017925, , Or.App., December 27, 2006(NO. A128830)

21. State v. Satterlee, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017927, , Or.App., December 27, 2006(NO. A129563)
22. Ware v. Sternenberg, 210 Or.App. 368, 150 P.3d 1115 (Table), 2006 WL 4017928, , Or.App., December 27, 2006(NO. A130857)

OR S.C. allowed review: 6-19-07:
343 Or 115, 162 P3d 988

1. Barrett v. Belleque, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2126601, , Or., June 19, 2007(NOS. A127929, S54622)
**2. Boldt v. Boldt, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2126592, , Or., June 19, 2007(NOS. A126175, S54714)**
3. Johnson v. Multnomah County Dept. of Community Justice, 343 Or. 115, 162 P.3d 988 (Table),
2007 WL 2126595, , Or., June 19, 2007(NOS. A128667, S54697)
4. Liles v. Damon Corp., 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2126597, , Or., June 19, 2007(NOS. A129113, S54734)
5. State v. Evans, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2126598, , Or., June 19, 2007(NOS. A125947, S54710)
6. Wolf v. Oregon Lottery Com'n, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2126600, , Or., June 19, 2007(NOS. A125420, S54681)
7. Anderson v. Wheeler, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155744, , Or., June 19, 2007(NOS. A131315, S54830)
8. Baran v. Hill, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155745, , Or., June 19, 2007(NOS. A125951, S54786)
9. Boles v. Hill, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155747, , Or., June 19, 2007(NOS. A132120, S54784)
10. Brown v. Bartlett, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155748, , Or., June 19, 2007(NOS. A125094, S54846)

11. Callender v. Hall, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155749, , Or., June 19, 2007(NOS. A126643, S54708)
12. Cato v. Alcoa-Reynolds Metals Co., 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155751, , Or., June 19, 2007(NOS. A125705, S54767)
13. Dahl v. Hall, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155752, , Or., June 19, 2007(NOS. A124050, S54785)
14. Darnell v. Hall, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155753, , Or., June 19, 2007(NOS. A129956, S54814)
15. Dorey v. Board of Parole and Post-Prison Supervision, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155754, , Or., June 19, 2007(NOS. A119395, S54838)
16. Echols v. Belleque, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155755, , Or., June 19, 2007(NOS. A125884, S54848)
17. Geer v. Hill, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155756, , Or., June 19, 2007(NOS. A126191, S54850)
18. Hessell v. Hill, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155757, , Or., June 19, 2007(NOS. A126965, S54797)
19. Hubbard v. Hill, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155758, , Or., June 19, 2007(NOS. A125556, S54713)
20. Duyet Hung Le v. Belleque, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155759, , Or., June
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19, 2007(NOS. A128265, S54840)
21. Medvedeva v. Employment Dept., 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155761, , Or.,

June 19, 2007(NOS. A131024, S54860)
22. Ryan v. Employment Dept., 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155764, , Or., June 19, 2007(NOS. A123753, S54826)
23. State ex rel. Dept. of Human Services v. R.G., 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155766, , Or., June 19, 2007(NOS. A133636, A133637, S54793)
24. State v. Gonzalez, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155768, , Or., June 19, 2007(NOS. A110105, S53771)
25. State v. McIntyre, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155770, , Or., June 19, 2007(NOS. A126774, S54817)
26. State v. Padilla, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155773, , Or., June 19, 2007(NOS. A130087, S54801)
27. State v. Rossi, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155774, , Or., June 19, 2007(NOS. A114797, S54807)
28. Terrain Tamers Chip Hauling, Inc. v. Insurance Marketing Corp. of Oregon, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155778, , Or., June 19, 2007(NOS. A128616, S54751)
29. Touch v. Schiedler, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155779, , Or., June 19, 2007(NOS. A124203, S54795)
30. Walsh v. Hall, 343 Or. 115, 162 P.3d 988 (Table), 2007 WL 2155781, , Or., June 19, 2007(NOS. A128138, S54824)

344 Or 1, 176 P3d 388

In re Marriage of Boldt

Supreme Court of Oregon.

In the Matter of the MARRIAGE OF
James H. BOLDT, Respondent on Review,
and
Lia Boldt, Petitioner on Review.

(CC No. 98-2318-D(3); CA A126175; SC S054714)

Argued and Submitted Nov. 6, 2007.
Decided Jan. 25, 2008.
Reconsideration Denied March 5, 2008.

[page number in original: ] **389 On review from the Court of Appeals.*
Appeal from Jackson County Circuit Court, Rebecca G. Orf, Judge. 210 Or.App. 368, 150 P.3d 1115 (2006).
Clayton C. Patrick, Clatskanie, argued the cause for petitioner on review. With him on the briefs was Steven C. Morasch.
James H. Boldt, Lacey, Washington, argued the cause and filed the briefs on his own behalf as respondent on review.
Robert A. Graham, Jr., filed briefs on behalf of amicus curiae Doctors Opposing Circumcision.
Michael H. Simon, Perkins Coie LLP, Portland, Michael S. Lazaroff, Mark D. Harris, Sandra J. Badin, and Eben A. Krim, Proskauer Rose LLP,

New York, Marc D. Stern, American Jewish Congress,
New York, Steven M. Freeman, Anti-Defamation League, New York, and Nathan Diament, Union of Orthodox Jewish Congregations of America, filed a brief on behalf of amici curiae American Jewish Congress, American Jewish Committee, Anti-Defamation League, and Union of Orthodox Jewish Congregations of America.

Before DE MUNIZ, Chief Justice, and GILLETTE, DURHAM, BALMER, KISTLER, and WALTERS, Justices.**
** Linder, J., did not participate in the consideration or decision of this case.

DE MUNIZ, C.J.

[page number in original: ] *4 The parties dissolved their marriage in 1999. Mother was awarded custody of their four-year-old son, M. Since 1999, the parties have battled over M's custody in three separate legal proceedings. When this third proceeding began, father had custody of M, who was then nine years old. In this proceeding, mother again seeks to change M's custody, on the ground that father intends to have M circumcised as part of M's conversion to the Jewish faith.

In the alternative, as a condition of father's continued custody, mother seeks an order prohibiting father from having M circumcised. The trial court denied mother's motion to change custody, but enjoined father from having M circumcised pending mother's appeal. Mother appealed the trial court

judgment to the Court of Appeals. That court affirmed the judgment without opinion. *Boldt and Boldt,* 210 Or.App. 368, 150 P.3d 1115 (2006).

We allowed mother's petition for review and on *de novo* review we now conclude that the trial court erred in failing to determine whether M desired the circumcision as father contended or opposed the circumcision as mother alleged.FN1 Because we view that finding [page number in original: ] ****390** as a necessary predicate to determining whether mother alleged a change in circumstance sufficient to trigger a custody hearing, we reverse the decisions of the Court of Appeals and the trial court and remand the case to the trial court. FN1. In reviewing a decision of the Court of Appeals that is an appeal from a suit in equity, we may review the case *de novo* or may limit our review to questions of law. ORS 19.415(4); *O'Donnell-Lamont and Lamont,* 337 Or. 86, 89, 91 P.3d 721 (2004), *cert. den.,*543 U.S. 1050, 125 S.Ct. 867, 160 L.Ed.2d 770 (2005) (reviewing custody dispute between father and maternal grandparents *de novo*). Because the Court of Appeals did not address the issues that we conclude must be considered, and because we are remanding the case to the trial court for further proceedings, we elect in this case to review the record *de novo.*

In the normal course, religious and medical decisions such as the one in this case, are considered private family matters determined by the parents or between parents and child, without resort to the courts. Unfortunately, however, these parties cannot or will not resolve this matter without court intervention. FN2 We therefore turn to the issue [page number in original: ] ***5**

raised on review, and take the following pertinent facts from the pleadings and affidavits submitted by the parties below.

FN2. The parties' public marital history is an acrimonious one, in which their battle for M's custody has been the centerpiece. The parties married in 1994. M was born in March 1995. The parties divorced in 1999, and the trial court granted sole and legal custody of M, then four years old, to mother. Father sought custody of M in 2001 and 2002. In 2002 the trial court granted father "sole and legal custody" of M. On the same day, the Court of Appeals affirmed without opinion, both father's appeal of a 2001 judgment and mother's appeal of the 2002 judgment. *Boldt and Boldt (A119754),* 203 Or.App. 545, 129 P.3d 280, 2005 WL 3778005 (2005); *Boldt and Boldt (A116684),* 203 Or.App. 545, 129 P.3d 280, 2005 WL 3778006 (2005), *rev. den.,*340 Or. 157, 130 P.3d 787 (2006). Both of those appeals were pending when this case was filed in the trial court.

Mother is a member of the Russian Orthodox Church and, while the parties were married, they raised M in that faith. About the time of the dissolution, father began studying Judaism. He also began teaching M and his other son, M's half brother, about Judaism. M learned Hebrew, began attending synagogue with his father, and in February 2004 began taking classes at the synagogue. In early May 2004, father converted to Judaism under the conservative movement coordinated by the United Synagogue of Conservative Judaism. Father told mother a few days later that he had converted. He also told mother about the possibility that M would convert to

Judaism and that, to do so, M would have to be circumcised.

On June 1, 2004, mother filed a motion for a temporary restraining order to prevent father from having M circumcised that evening. The trial court held a telephonic hearing on mother's motion that afternoon. Mother testified that, the day before, she had learned from M that father was planning to have M circumcised against M's wishes. She acknowledged that she had known about the possibility of the circumcision for nearly a month, but asserted that she had not known it would happen so soon. She also stated that she had not previously known that M objected to the procedure. Father responded that the court lacked jurisdiction because M had been living with him in Washington for almost two years. He also contended that, as sole custodian of M, he had the authority to make the decision to have M circumcised. Finally, father asserted that (1) M wanted to be circumcised because M wanted to convert to Judaism; (2) M's doctor also had recommended circumcision for medical reasons; and (3) M's doctor would perform the circumcision. Following the telephonic hearing, the trial court entered a temporary restraining order prohibiting M's circumcision until such [page number in original:] ***6** time as mother had filed a written motion to change custody and the court had held a hearing to consider the jurisdictional issue.

On June 4, 2004, mother filed two motions. The first was a motion for temporary custody under ORS 107.139,FN3 or in the alternative, for [page number in original: ] ****391** an order prohibiting father from having M circumcised. The second was a motion to change custody under ORS 107.135.FN4 In

support of both motions, mother submitted an affidavit in which she alleged that father intended to have M circumcised against M's wishes. She asserted that she was not concerned that M might convert to Judaism, but was concerned that the conversion required him to be circumcised. She alleged that M had told her the day before the planned circumcision that he did not want to be circumcised. She also asserted that M had said that he was afraid to contradict his father regarding the circumcision. Mother averred that, "I hope that ultimately the court will be able to interview [M] in chambers so that his true feelings about his can be determined." Finally, mother expressed concern that a flawed circumcision could result in permanent injury to M.

FN3. ORS 107.139 provides, in part:

"(1)(a) Following entry of a judgment, a court may enter ex parte a temporary order providing for the custody of, or parenting time with, a child if:

"(A) A parent of the child is present in court and presents an affidavit alleging that the child is in immediate danger;

"(B) The parent has made a good faith effort to confer with the other party regarding the purpose and time of this court appearance; and

"(C) The court finds by clear and convincing evidence, based on the facts presented in the parent's testimony and affidavit and in the testimony of the other party, if the other party is present, that the child is in immediate danger."

The legislature amended ORS 107.139 and ORS 107.135 in 2007. However, those amendments are not material to the issues presented here. For that reason, we refer to the current versions of the

statutes.
FN4. ORS 107.135 provides, in part:
"(1) The court may at any time after a judgment of annulment or dissolution of marriage or of separation is granted, upon the motion of either party and after service of notice on the other party in the manner provided by ORCP 7 * * *:
"(a) Set aside, alter or modify any portion of the judgment that provides * * * for the custody, parenting time, visitation, support and welfare of the minor children[.]"
[page number in original: ] *7 In his response to those motions, father argued that the court lacked jurisdiction under ORS 109.744(1)(a),FN5 because M had lived with father in Washington State since 2002. Father also argued that the court lacked authority to grant mother's motions because (1) granting the motions would violate father's freedom of religion under the religion clauses of the United States and Oregon constitutions; (2) there had not been a substantial change of circumstances since the October 9, 2002, modification justifying a change in custody; (3) it would not be in M's best interest to change custody; (4) the circumcision was medically advisable independent of the religious reasons for it; and (5) although M's wishes were "legally irrelevant," M wanted to be circumcised. Father's response included affidavits from M's half-brother and father's domestic partner. Each of those affidavits stated that M wanted to be circumcised so that he could convert to Judaism. Father also submitted an affidavit from M's urologist, Dr. Ellen. Ellen stated that he had met with M and discussed the procedure with him, that

M understood the procedure and had stated that he wanted the circumcision so that he could convert to Judaism. According to Ellen, M did not appear to be coerced. Ellen also stated that there were medical concerns that were sufficient cause for recommendation for the procedure. Ellen averred that circumcision is a safe procedure, that there would be some minor discomfort for about three days that would not prevent M from carrying on normal activities, and that M's circumcision would greatly reduce M's risk of penile cancer and certain infections.

FN5. ORS 109.744 provides, in part:

"(1) [A] court of this state that has made a child custody determination consistent with ORS 109.741 or 109.747 has exclusive, continuing jurisdiction over the determination until:

"(a) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships[.]"

After the parties filed briefs, the trial court conducted a telephonic hearing on the jurisdictional issue. At the end of that hearing the trial court concluded that it had jurisdiction over the parties.FN6 The court also concluded that the [page number in original: ] *8 decision whether a child has elective surgery is reserved to the custodial parent. However, because the parties' previous custody order appeals were still pending in the Court of Appeals, the trial court entered an order prohibiting M's circumcision until those appeals were final. The

court stated that it would not hold an evidentiary hearing on the motion for a change of custody because a decision by the Court of Appeals on mother's other custody appeal could [page number in original: ] **392 result in M's custody reverting to mother, thereby mooting the question. The trial court also concluded that, in any event, mother had not alleged sufficient grounds for an emergency change of custody to mother.

FN6. On appeal, neither party has challenged the trial court's jurisdictional ruling, and we have no reason to disturb the trial court's decision on that issue.

Both parties objected to the form of the judgment, and the trial court held another telephonic hearing on their objections. Following that hearing, the trial court concluded, based on the affidavits submitted by the parties, that the decision to have M circumcised was not a change of circumstances sufficient to trigger an evidentiary hearing. Shortly after the second telephonic hearing, the trial court entered a supplemental judgment reflecting the rulings it had made orally at the two hearings. The court denied mother's motion for temporary custody as well as her motion for an order to show cause why a change of custody should not be granted. In 2006, the trial court corrected the judgment to clarify that it had enjoined the parties from having M circumcised until after any appeals in this case were resolved.

Mother appealed from the supplemental judgment and, as noted, the Court of Appeals affirmed without opinion. We allowed review. On

review, mother argues that the trial court erred in not granting her an evidentiary hearing on her motion to change custody so that she could present evidence regarding M's health, welfare, and best interests. She also argues that a custodial parent does not have the absolute right to have elective, nonmedically necessary surgery performed on his or her child without regard to the possible adverse consequences. Finally, she argues that a trial court has the authority to condition an award of custody when it is necessary to protect the best interests of the child.

Father responds that the trial court properly denied mother's motion for a change of custody. He argues that no [page number in original: ] *9 evidentiary hearing was required on the motion, because mother failed to satisfy her burden under ORS 107.135 to demonstrate a sufficient change in circumstances. He also argues that mother received a hearing, because there was a telephonic hearing during which she testified. Father argues that the trial court examined the affidavits submitted by both parties and properly found that there was an insufficient basis to go forward with an evidentiary hearing.

This court has established a two-step inquiry for determining whether a court should modify a custody arrangement. *See Ortiz and Ortiz,* 310 Or. 644, 649, 801 P.2d 767 (1990) (formulating the inquiry). A parent seeking a custody change must show that (1) after the original judgment or the last order affecting custody, circumstances relevant to the capacity of either the moving party or the legal custodian to take care of the child properly have

changed, and (2) considering the asserted change of circumstances in the context of all relevant evidence, it would be in the child's best interests to change custody from the legal custodian to the moving party. *Id. See also Greisamer and Greisamer,* 276 Or. 397, 400, 555 P.2d 28 (1976) (describing two-step analysis). A parent seeking a change of custody bears the burden of showing a change in circumstances. *See State ex rel Johnson v. Bail,* 325 Or. 392, 396, 938 P.2d 209 (1997) (so stating).

The inquiry into whether there has been a change in circumstances is a factual one that relates to the capability of one or both parents to properly care for the child. *Greisamer,* 276 Or. at 400, 555 P.2d 28. One way a parent can show a change in circumstances is to show a change that has injuriously affected the child. *Henrickson v. Henrickson,* 225 Or. 398, 403, 358 P.2d 507 (1961). Another is to show a change in the other parent's ability or inclination to care for the child in the best possible manner. *Id.* at 404, 358 P.2d 507. When there is insufficient evidence of a change in circumstances since the last custody determination, a court does not consider the second step of the analysis. *See State ex rel Johnson,* 325 Or. at 397, 938 P.2d 209 (so stating). Therefore, the question whether mother was entitled to an evidentiary hearing to present evidence regarding M's best interests turns on whether she, as the parent seeking a change of custody, satisfied her initial burden of demonstrating a [page number in original: ] ***10** change in circumstances relevant to the capacity of father to properly care for M since the 2002 custody determination.

[page number in original: ] **393 The trial court ruled that decisions regarding elective surgery for a child are reserved to the custodial parent, and denied mother's motion without a hearing on the merits. We agree with the trial court that the authority of the custodial parent to make medical decisions for his or her child, including decisions involving elective procedures and decisions that may involve medical risks, is implicit in both our case law and Oregon statutes. For example, in *Ortiz,* this court observed that, "in the context of divorced persons, 'custody' is the legal relationship between a minor child and the legal custodian, *i.e.,* the person to whom the court has given the *primary* rights and responsibilities to supervise, care for, and educate the child[.]" 310 Or. at 649, 801 P.2d 767 (emphasis in original).

However, a statute, ORS 107.154, provides that an order of sole custody to one parent shall not deprive the noncustodial parent of specific rights, including the right to consult with any person who may provide care or treatment for the child and to inspect and receive the child's medical records, as well as the right to authorize emergency care for the child if the custodial parent is unavailable.FN7 Father argues that ORS 107.154 limits a noncustodial parent's rights to only those rights specified in that statute, that is, mother can "consult with" M's doctor, but cannot override father's decisions regarding M's medical care. For that reason, father argues, his decision to have M circumcised cannot be the basis for changing a custody order or holding an evidentiary hearing on the issue.

FN7. ORS 107.154 provides, in part:

"Unless otherwise ordered by the court, an

order of sole custody to one parent shall not deprive the other parent of the following authority:
" * * * * *
"(3) To consult with any person who may provide care or treatment for the child and to inspect and receive the child's medical, dental and psychological records, to the same extent as the custodial parent may consult with such person and inspect and receive such records;
"(4) To authorize emergency medical, dental, psychological, psychiatric or other health care for the child if the custodial parent is, for practical purposes, unavailable[.]"
[page number in original: ] *11 Mother, joined by *amicus curiae* Doctors Opposing Circumcision (DOC), asserts that there is no more important decision to make for a male child
than to require that the child undergo permanent modification to his body, and argues that an evidentiary hearing is required to find out whether M objects to the circumcision. She also contends that an evidentiary hearing is required so that she may present evidence regarding the harmful effects and permanent nature of circumcision. Indeed, mother and DOC assert that, because of the significant medical risks associated with circumcision, M should not be circumcised even if he states that he wants to undergo the procedure.

In response, father, joined by *amicus curiae* American Jewish Congress, American Jewish Committee, Anti-Defamation League, and Union of Orthodox Jewish Congregations of America (collectively, AJC), argues that the trial court did not need to hold an evidentiary hearing, because M's attitude about whether he wants the circumcision is

not legally significant. Father asserts that a child is not the decision-maker on such questions, any more than an infant who is circumcised. If the legislature had wanted a male child to have a say in whether he is circumcised, he contends, it could have adopted a statute to that effect, as it has done in other statutes such as ORS 109.610 (giving minors the right to consent to treatment for venereal disease without parental consent). Father also contends that the health risks associated with male circumcision are *de minimus*. In any case, father maintains that the affidavits he supplied to the trial court demonstrate that M does want to be circumcised.

Finally, father and AJC argue that father has a constitutionally protected right to circumcise his son. They maintain that American Jews must be free to practice circumcision because it is and has been one of the most fundamental and sacred parts of the Jewish tradition. Father concludes that, if this court requires the trial court to hold an evidentiary hearing, we would usurp the role of the custodial parent and violate the First Amendment to the United States Constitution.

Although the parties and *amici* have presented extensive material regarding circumcision, we do not need to [page number in original: ] *12 decide in this case [page number in original: ] **394 which side has presented a more persuasive case regarding the medical risks or benefits of male circumcision. We conclude that, although circumcision is an invasive medical procedure that results in permanent physical alteration of a body part and has attendant medical risks, the decision to have a male child circumcised for medical or religious reasons is one that is commonly and

historically made by parents in the United States. We also conclude that the decision to circumcise a male child is one that generally falls within a custodial parent's authority, unfettered by a noncustodial parent's concerns or beliefs-medical, religious or otherwise. Were mother's concerns or beliefs regarding circumcision all that were asserted in the affidavits in this case, we would conclude that mother did not carry her initial statutory burden to demonstrate a sufficient change in circumstances demonstrating father's inability to properly care for M.

However, in this case, mother has averred in her affidavit that M objects to the circumcision.FN8 In our view, at age 12, M's attitude regarding circumcision, though not conclusive of the custody issue presented here, is a fact necessary to the determination of whether mother has asserted a colorable claim of a change of circumstances sufficient to warrant a hearing concerning whether to change custody. That is so because forcing M at age 12 to undergo the circumcision against his will *could* seriously affect the relationship between M and father, and *could* have a pronounced effect on father's capability to properly care for M. *See Greisamer,* 276 Or. at 400, 555 P.2d 28 (illustrating proposition). Thus, if mother's assertions are verified the trial court would be entitled to reconsider custody. As to that inquiry, however, we think that no decision should be made without some assessment of M's true state of mind. That conclusion dictates the outcome here.

FN8. In direct contradiction to mother's sworn assertion, father has asserted that M accepts the circumcision.

We remand the case to the trial court with instructions to resolve the factual issue whether M agrees or objects to the circumcision. In order to resolve that question, the trial court may choose to determine M's state of mind utilizing [page number in original: ] *13 means available to it under the relevant provisions of ORS
107.425.FN9 [page number in original: ] **395 If the trial court finds that M agrees to be circumcised, the court shall enter an order denying mother's [page number in original: ] *14 motions. If, however, the trial court finds that M opposes the circumcision, it must then determine whether M's opposition to the circumcision will affect father's ability to properly care for M. And, if necessary, the trial court then can determine whether it is in M's best interests to retain the existing custody arrangement, whether other conditions should be imposed on father's continued custody of M, or change custody from father to mother.

FN9. In this state the legislature has made it clear that, in determining child custody in a variety of settings, a court, when appropriate, may use various methods to determine a child's views or best interests.

ORS 107.425 provides, in part:

" '(2) The court, on its own motion or on the motion of a party, may order an independent physical, psychological, psychiatric or mental health examination of a party or the children and may require any party and the children to be interviewed, evaluated and tested by an expert or panel of experts. The court may also authorize the expert or panel of experts to interview other persons and to request other persons to make

available to the expert or panel of experts records deemed by the court or the expert or panel of experts to be relevant to the evaluation. The court may order the parties to authorize the disclosure of such records. In the event the parties are unable to stipulate to the selection of an expert or panel of experts to conduct the examination or evaluation, the court shall appoint a qualified expert or panel of experts. The court shall direct one or more of the parties to pay for the examination or evaluation in the absence of an agreement between the parties as to the responsibility for payment but shall not direct that the expenses be charged against funds appropriated for public defense services. If more than one party is directed to pay, the court may determine the amount that each party will pay based on financial ability.

"* * * * *

"(4) The provisions of this section apply when:

"(a) A person files a domestic relations suit, as defined in ORS 107.510;

"(b) A motion to modify an existing judgment in a domestic relations suit is before the court;

"(c) A parent of a child born to an unmarried woman initiates a civil proceeding to determine custody or support under ORS 109.103;

"(d) A person petitions or files a motion for intervention under ORS 109.119;

"(e) A person or the administrator files a petition under ORS 109.125 to establish paternity and paternity is established; or

"(f) A habeas corpus proceeding is before the court.

"(5) Application of the provisions of subsection (1), (2) or (3) of this section to the proceedings under subsection (4) of this section does not prevent initiation, entry or enforcement of an order of support.

"(6) The court, on its own motion or on the motion of a party, may appoint counsel for the children. However, if requested to do so by one or more of the children, the court shall appoint counsel for the child or children. A reasonable fee for an attorney so appointed may be charged against one or more of the parties or as a cost in the proceedings but shall not be charged against funds appropriated for public defense services.

"(7) Prior to the entry of an order, the court on its own motion or on the motion of a party may take testimony from or confer with the child or children of the marriage and may exclude from the conference the parents and other persons if the court finds that such action would be likely to be in the best interests of the child or children. However, the court shall permit an attorney for each party to attend the conference and question the child, and the conference shall be reported."

The legislature amended ORS 107.425 in 2007. However, those amendments are not material to the issues presented here. For that reason, we refer to the current version of the statute.

The decision of the Court of Appeals is reversed. The supplemental judgment of the circuit court is reversed. The case is remanded to the circuit court for further proceedings.

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Marriage of
JAMES H. BOLDT,
Petitioner Respondent,
Respondent on Review,
and
LIA BOLDT,
Respondent-Appellant, Petitioner on review.

Court of Appeals A126175
S054714

**ORDER DENYING PETITIONS FOR RECONSIDERATION AND EXTENDING STAY**

Upon consideration by the court.

The court has considered the petitions for reconsideration and orders that the petitions be denied.

Subject to further order of the trial court, the trial court's stay enjoining the parties from having M circumcised is extended until 14 days from the date of the appellate judgment.

March 5, 2008 /s/ Paul DeMuniz
DATE CHIEF JUSTICE

c: Clayton C Patrick Robert
Robert A Graham, Jr
Steve C Morasch

Michael H Simon

James H Boldt

gar/S054714ordy080305

**ORDER DENYING PETITION FOR RECONSIDERATION AND EXTENDING STAY**

REPLIES SHOULD BE DIRECTED TO:
State Court Administrator, Records Section, Supreme Court Building, 1163 State Street, Salem, OR 97301-2563
Page 1 of 1

United States Constitution, First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

## Fourteenth Amendment to United States Constitution (Section 1)

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CIRCUIT COURT OF OREGON
COUNTY OF JACKSON

| | | |
|---|---|---|
| In the matter of the Marriage of: | ) | No. 98-2318-0(3) |
| JAMES H. BOLDT, Petitioner, | ) | Response to Respondent's Motion for Order to Show Cause re Modification of Judgment (Custody) |
| and | ) | |
| LIA BOLDT Respondent. | ) | |
| _____ | ) | |

Respondent-Mother has moved for an order to show cause to modify the Judgment of the Court to change custody of the child from Father to Mother. The motion should be dismissed. The reasons are

. . .

there is no authority for the Court to grant the motion requested by Mother, because:
[end of page 1 in original] [page 2 of original]

A. granting the motions would violate the freedom of religion clause First Amendment of the United States Constitution—and the freedom of religion clauses of the Oregon Constitution (Art. 1, Sees. 2 and 3).

. . .

E. While the child's wish in such matters is legally irrelevant, to the extent that such wishes are deemed significant to the Court's decision, the affidavits before the Court show that the child supports the circumcision and wants it, as part of the process of becoming Jewish. . . .
[page 2 of original]

CIRCUIT COURT OF OREGON
COUNTY OF JACKSON

| | |
|---|---|
| In the matter of the Marriage of: JAMES H. BOLDT, Petitioner, and LIA BOLDT Respondent. | No. 98-2318-0(3) Petitioner's Brief for Hearing on June 11, 2004 |

[page 10 of original]

. . .

II.. Authority of Court

A. Freedom of Religion

As noted in the affidavits submitted by Father, circumcision has been practiced as part of Judaism for about 3,700 years. There is no statute in Oregon (or Washington) to restrict it in any way. There is no case in point on the questio probably because no court ever seriously entertained a doubt that Jews could hs their sons circumcised.

In a general way, we know from West Virginia State Board of Education v Barnette, 319 US 624, 639, 87 LEd 1628, 1638 (1943) (wherein the Court struck down a requirement that public school students salute the U.S. flag in violation o their religion), that: ".. . freedoms of speech and of press, of assembly, and of worship .. . are susceptible of restriction onfy to prevent grave and immediate

danger to interests which the state may lawfully protect." That applies yet more where there is no statute, no court rule, and no case prohibiting circumcision.
[end of page 10 of original]

Even if there were (a) an Oregon law against circumcision, (b) statutory authorization for a Court to order custodial parents to not have their sons circumcised, or (c) statutory authorization for a court to change custody because a parent intended to have his son circumcised, such an ostensible authorization would be void. The Court in Robinson v. Price, 615 F2d 1097 (1980), the Court wrote that "Even a facially neutral regulation may 'offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." (at 1099).

The only case Petitioner's counsel has found mentioning circumcision in the context of the authority of government to prohibit it, even though it is a religious practice, is Thomas et al v. Anchorage Equal Rights Commission et al, 220 F.3d 1134 (9 Cir, 2000). Several landlords mounted a First Amendment free exercise of religion and free speech challenge to the Alaska housing laws prohibiting discrimination on the basis of marital status.

> "Kevin Thomas and Joyce Baker2 (the "landlords") individually own residential rental properties in Anchorage, Alaska. Both are devout Christian: who are committed to carrying out their religious faith in all aspects of their lives, including their commercial activities as landlords. Central to their faith is a belief that cohabitation between an

> unmarried man and an unmarried woman is a sin. The landlords also believe that facilitating the cohabitation of an unmarried couple is tantamount to committing a sin themselves. Based on this religious belief, the landlords claim that they have refused to rent to unmarried couples in the past ana :: a they intend to continue to do so in the future. Both the State of Alaska and the City of Anchorage have adopted laws that outlaw certain forms of discrimination in to sell, lease or rent.. . real property to a person because of . . . marital status."

The majority found it non-justiciable : "at this stage the dispute is purely hypothetical and the injury is speculative. Whether viewed through the lens of [end of page 11 of original] [page 12 of original] standing or ripeness, resolution of the First Amendment issues is premature." The dissent (Judge Andrew J. Kicinfeld) opined that the case was justiciable. Judge Kleinfeld's opinion included this important dictum (with which the majority did not disagree):

> "Suppose, hypothetically, that a legislature passed a facially neutral law prohibiting circumcision, and that its reason was not anti-religious animus, but concern that the possible pain inflicted on the child exceeded the medica benefits from the procedure. Such a law would make it impossible for Jews and Moslems to practice one of their most sacred religious obligations. I suspect that under *Smith,* the no-circumcision law would be unconstitutional, by analogy to the no-parochial-schools law in *Pierce v. Society* [*50] of *Sisters,* n13 because

the no-circumcision law would abridge both the right to rear one's children in one's religion and the free exercise of one's religion. n14

[Footnotes]

nn 10 and 14 Employment Division v. Smith, 494 U.S. 872, 108 L Ed. 2d 876, 110S.C1 1595 (1990).

n13 Pierce v. Society of Sisters, 268 U.S. 510, 69 L Ed. 1070, 45 S. Ct. 571 (1925)."

. . .

[page 16 of original]

First, it should be noted that the child's attitude about whether he wants the circumcision is not legally significant The child is not the decision-maker on such questions—any more than an infant is who is circumcised. Had the legislature wanted to have minor boys have a say in it—or even to be able to make the decision on it themselves—they could have adopted a statute to that effect; they have not.

The legislature has adopted statutes giving minors rights they would not have had at common law. Examples include:

1. 109.610 Right to treatment for venereal disease without parental consent
2. 109.640 Right to medical or dental treatment without parental consent; physicians may provide birth control information to any person (minors over 15)
3. 109.670 Right to donate blood, (minors over 16)
4. 109.675 Right to diagnosis or treatment for mental or emotional disorder or chemical dependency without parental consent (minors over 16)

5. 109.697 Right to contract for dwelling unit and utilities without parental consent (certain minors over 16)

. . .

CIRCUIT COURT OF OREGON
COUNTY OF JACKSON

| | | |
|---|---|---|
| In the matter of the Marriage of: JAMES H. BOLDT, Petitioner, and LIA BOLDT Respondent. | ) No. 98-2318-0(3)<br>)<br>) Petitioner's Response to<br>) Respondent's Objections to<br>) Form of Order Submitted<br>) by Petitioner<br>) (Oral Argument Requested) | |

[page 4 of original]

. . .

Ruling on Free Exercise of Religion

Petitioner clearly raised the issue of the free exercise of religion clauses of the United States Constitution and the Oregon Constitution, as it relates to the decision before the Court. The Court's order should of course reflect its ruling on this important, and potentially pivotal, issue.

Astonishingly, Respondent urges the Court to *not even address this issue*. Respondent's reason for this position is that the Court did not discuss the issue during oral argument on June 11, 2004. While the Court did not mention this issue in the hearing of June 11, 2004, it appears that the Court's implicit ruling was that Petitioner-Father, as a Jewish custodial parent, does not have a First Amendment, or Oregon Constitutional, right to have the circumcision done---for if Petitioner were deemed to have such a right, then presumably a court could not

contravene that right, even on a temporary basis. It is unavailing to Respondent to argue that the Court should not rule on the issue because it is enjoining Petitioner from having the child circumcised pending an appellate judgment; indeed that injunction is precisely why the Court should rule on the issue: [end of page 4 in original; beginning of page 5]

(a) if Petitioner (and his minor son, for whom Petitioner is, as the Court has noted, the decision-maker) do have a constitutional right to have the circumcision done, then it would outside the province of the Court to prohibit it, even temporarily.

(b) if Petitioner (and his minor son, for whom Petitioner is, as the Court has noted, the decision-maker) does *not* have a constitutional right to have the circumcision done (which, implicitly, was the Court's view at the June 11 hearing) then the order should expressly state that.

The importance of addressing this issue is underscored by the uniqueness of the issue. There is *no* reported case---in *any* jurisdiction in the United States---that prohibits a Jewish custodial parent from having his (or her) minor son circumcised. Respondent has asked the Court to become what is apparently the first court in American history to issue such an injunction---when the free exercise of religion is clearly a central issue---yet is requesting the Court to ignore the issue in its order.

Somewhat related First Amendment Free Exercise of Religion cases (there are none squarely on point) suggest considerable deference to a parent's free exercise of religion in raising children.

In State of Wisconsin v. Yoder, 406 US 205, 32 L Ed 2d 15, 92 S Ct 1526 (1972), the Supreme Court ruled that Wisconsin's compulsory school attendance

law (under which Amish parents were convicted, for not sending their children to public schools) violated the First Amendment. The parents refused to have their children attend public secondary school; they also did not enroll their children in a private school nor have them participate in any non-school alternative that provided essentially the same instruction. Doing so would have violated the defendants'

[end of page 5 in original; beginning of page 6]

religious beliefs. These beliefs held, inter alia, that school age children (especially secondary age) "must acquire Amish attitudes favoring manual work and the specific skills necessary to perform the adult role of an Amish farmer or housewife. The must learn to enjoy physical labor. . . . And . . . must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligation imposed by adult baptism." 406 US 211, 32 L Ed 2d 22-23.

The Court generalized its analysis by holding that "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 US 215, 32 L Ed 2d 25.

Closer yet to the instant case, the Court in Yoder held that

"when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First

Amendment." 406 US 233, 32 L Ed 2d 35. (emphasis added).

Less directly related, but still illustrating the importance of the free exercise of religion, is Thomas v. Review Bd., Ind. Empl. Sec. Div., 450 US 707, 67 L Ed 2d 624, 101 S Ct 1425 (1981). In Thomas, a Jehovah's Witness terminated his job at a foundry when he was transferred to a division that produced turrets for military tanks. He claimed his religious beliefs prevented him from participating in the production of war materials. His application for unemployment benefits was denied by the Review Board of the Indiana Employment Security Division. It (and

[end of page 6 in original; beginning of page 7]

eventually the Indiana Supreme Court) found that Mr. Thomas had quit work for "personal" reasons and not "good cause [arising] in connection with [his] work as required by the Indiana unemployment compensation statute." 450 US 712, 67 L Ed 2d 630.

The United States Supreme Court reversed, finding that the state could not deny unemployment benefits to someone who, regardless of the state law requirements, terminated work for religious reasons. The Court held, inter alia, that:

> "Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion. Sherbert v. Verner, supra; Wisconsin v. Yoder, 406 U.S. 205, 215-216 (1972). The determination of what is a "religious" belief or practice is more often than not a difficult and delicate task, as the division in the Indiana Supreme Court attests. 7

[footnote omitted] However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." 450 US 713-714, 67 L Ed 2d 624.

"The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." 450 US 715-716, 67 L Ed 2d 632.

"More than 30 years ago, the Court held that a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." 450 US 716, 67 L Ed 2d 633.
[end of page 7 in original; beginning of page 8]

Indeed quoting from Yoder, the Thomas Court instructed that:

> "It is true that, as in Sherbert, the Indiana law does not compel a violation of conscience. But, "this is only the beginning, not the end, of our inquiry." 374 U.S., at 403 - 404. In a variety of ways we have said that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Wisconsin v. Yoder, 406 U.S., at 220 ." (emphasis added).

The Court noted that unacceptable conduct of a state can be indirect:

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." 450 US 717-718, 67 L Ed 2d 634.

> "The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." Wisconsin v. Yoder, supra, at 215." 450 US 718, 67 L Ed 2d 634.

In Yoder and Thomas, there was a *state statute* requiring certain conduct (Yoder) or prohibiting it (Thomas). Respondent has asked the Court in the instant case to go much much further: to enjoin conduct

(a) that no statute forbids,

(b) that no reported case in the country has ever prohibited (even temporarily), and

(c) that competent, this-child-specific, abundant medical evidence shows is not only safe but medically advisable.

[end of page 8 in original; beginning of page 9]
A party asking the Court to go that far should not be heard to urge the Court to ignore a pivotal issue squarely presented to it.

A court issuing (what appears to be) a decision unprecedented in American judicial history, over a squarely presented Free Exercise of Religion objection, should, at a minimum, address the issue. If the Court concludes (as it would have to, to

prohibit the religiously motivated circumcision) that Petitioner (nor the child, with the Petitioner as his legal spokesperson) does not have a constitutional right to have the child circumcised, then the Court should explicitly say so in its order.

The issue needs to be addressed in the order.

Custodial Parent's Decision

In its remarks of June 11, 2004, the Court clearly stated that the decision of whether or not to have the child circumcised is for the custodial parent. This should be clearly set forth---as it is in Petitioner's proposed order. Respondent's proposed order is somewhat indefinite---stating only that "The Court believes that the decision whether or not to circumcise Misha [neither the child's legal name nor the nickname he presently has] is a decision properly made by the custodial parent." (emphasis added). It was not a *belief*, it was a *legal conclusion*. Indeed it is one dispositive of the case but for the waiting period to see whether an appellate court judgment will reverse the Court's decision.

. . .

[page 28 in original]

**Rights of Custodial Parent: Constitutional**

In Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), the U.S. Supreme Court held that a parental rights to raise their children are constitutionally protected. The parents in that case were never married. Upon their separation, the mother (Tommie Granville) became the de facto custodial parent. The father visited the children. Two years later he died. Under a Washington statute, the paternal grandparents petitioned the court for visitation rights with the two children. The trial court (superior court) found that visitation greater than what the mother wanted, was in the best interest of the children. Mother appealed. During the appeal mother remarried and the stepfather adopted the children.

The Washington Court of Appeals reversed (in favor of mother and the children's new father). The grandparents (Troxels) petitioned for review to the Washington Supreme Court. The state supreme court affirmed the state Court of Appeals, holding, inter alia, that the state statute

> "unconstitutionally infringes on the fundamental right of parents to rear their children. 'It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision.' *Ibid.*, 969 P.2d at 31. The Washington Supreme Court held that 'parents have a right to limit visitation of their children with third persons,' and that between parents and judges, 'the parents should be the ones to choose whether to

expose their children to certain people or ideas.' Id. at 21, 969 P.2d at 31.'" 530 US at 63.

The United State Supreme Court granted certiorari. In affirming the decision of the state Supreme Court, the U.S. Supreme Court offered important guidance on the constitutional stature of parental rights in decision-making about their children:

[end of page 28 in original; beginning of page 29]

" ... no court has found, that Granville [Mother] was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children. As this Court explained in *Parham:*

"Our constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations .... The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." 442 U.S. at 602, 61 L Ed 2d 101, 99 S Ct 2493 (alteration in original) (internal quotation marks and citations omitted).

in Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their controL" We explained in *Pierce* that "the child is not the mere creature of the State;

those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535. We returned to the subject in Prince v. Massachusetts, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. at 166, 88 L Ed 645, 64 S Ct 438." 530 US at 65-66.

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children ..... [cases cited] ... Quilloin v. Walcott, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 98 S. Ct. 549 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); Parham v. J. R., 442 U.S. 584, 602, 61 L. Ed. 2d 10t 99 S. Ct. 2493 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); Santosky v. Kramer, 455 U.S. 745, 753, 71 L. Ed. 2d 599,102 S. Ct. 1388 (1982) (discussing "the fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Glucksberg, supra,* at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the

right ... to direct the education and upbringing of one's children" (citing *Meyer* and *Pierce)).* In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions

[end of page 29 in original; beginning of page 30]

> concerning the care, custody, and control of their children. 530 US at 66 (emphasis supplied).

While the opinion of the Court in Troxel was technically a plurality (of four Justices), concurring opinions by Justices Souter and Thomas make it evident that the central reasoning of the Court is supported by a full majority. Justice Souter thought it enough to simply affirm the Washington Supreme Court, noting that its decision was consistent with the U.S. Supreme Court's opinions on substantive due process. He added, though that:

> "See 137 Wn.2d at 20, 969 P.2d at 31 ('It is not within the province of the state to make significant decisions concerning the custody of children merely because it could make a 'better' decision") ... , On that basis in part, the Supreme Court of Washington invalidated the State's own statute: "Parents have a right to limit visitation of their children with third persons.' Id. at 21, 969 P.2d at 31." 530 US at 78.

and

> "We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment. See,

*e.g.,* Meyer v. Nebraska, 262 U.S. 390, 399,401,67 L. Ed. 1042,43 S. Ct. 625 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 535, 69 L. Ed. 1070,45 S. Ct. 571 (1925); Stanley v. Illinois, 405 U.S. 645, 651, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972); Wisconsin v. Yoder, 406 U.S. 205, 232, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972); Quilloin v. Walcott, 434 U.S. 246, 255, 54 L. Ed. 2d 511, 98 S. Ct. 549 (1978); Parham v. J. R., 442 U.S. 584, 602,61 L. Ed. 2d 101,99 S. Ct. 2493 (1979); Santosky v. Kramer, 455 U.S. 745, 753, 71 L. Ed. 2d 599,102 S. Ct. 1388 (1982); Washington v. Glucksberg, 521 U.S. 702, 720, 138 L. Ed. 2d 772,117 S. Ct. 2258 (1997)." 530 US at77.

Justice Thomas, while he would have expressly applied a strict scrutiny standard of review to such "infringements of fundamental rights," did fully agree with the four Justices representing the opinion of the Court. Indeed he wrote that:

> "...I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. Our decision in Pierce v. Society of Sisters, 268 U.S. 510,69 L. Ed. 1070,45 S. Ct. 571 (1925), holds that parents have a fundamental constitutional right to rear their children ... " 530 US at 80.

[end of page 30 in original; beginning of page 31]

Oregon had occasion to consider Troxel early the following year in Harrington v. Daum, 172 Or App 188, 18 P.3d 456 (2001)--- another case catalyzed by tragedy. Mother was awarded custody of the two boys in a dissolution of marriage; Father had visitation. About a month

after the decree was entered, Mother began dating Petitioner, who developed a close and positive relationship with the children over the course of the next 20 months. Petitioner (who never married Mother) spent a lot of time with the children and Mother. Indeed,

> "Petitioner established a play area in one part of his living room for the children, furnishing it with appropriate toys and stuffed animals. Because he got off work before mother, petitioner usually picked the children up from day care. The children liked petitioner and enjoyed being with him.
>
> In late August 1997, petitioner took the children on an overnight church outing that was limited to men and boys. That weekend, mother died in an automobile accident." 172 Or App at 190.

While Father allowed Petitioner some visitation at first, he later decided that it should be substantially curtailed in time and occur only when Father was present. Petitioner filed an ORS 109.119(3)(b) request for (more) visitation, as having a relationship of "substantial continuity for at least one year, through interaction, companionship, interplay and mutuality." The trial court granted relief to Petitioner and Father appealed.

In reversing for Father, the Court noted Troxel and held that

> "Assuming that petitioner has made an adequate showing that the best interests of the children would be served by some amount of visitation with him, the issue is whether his statutory right to court-ordered visitation must

> yield to father's right to control visitation with the children. Father, relying on several decisions of the United States Supreme Court, argues that the Due Process Clause of the Fourteenth Amendment gives him a supervening constitutional right and prohibits the court from granting visitation rights to petitioner over his objection." 172 Or App at 194.

[end of page 31 in original; beginning of page 32]

This Court in O'Donnell-Lamont and Lamont and O'Donnell and Miller, 337 Or 86, 91 P3d 721 (2004) considered Troxel as it applied to an ORS 109.119 revised by the legislature in an effort to make it comply with Troxel. The Court held, on the facts of that case, that the newly revised ORS 109.119(3)(b) was constitutional, facially and as applied. This Court found, on the record presented in that case, that, consistently with Troxel, that the grandparents had sufficiently rebutted the presumption of custody in the parent, in accordance with enumerated statutory factors.

The Court noted also that *"Troxel* holds that the Due Process Clause requires that "some special weight" be given to the interest of the legal parent. 337 Or at 100-101 and 120.

> Relatedly, this Court also observed that
> " ... the due process right that the Supreme Court affirmed in *Troxel* is important, but limited: a court may not override a parent's decision about the care or custody of a child simply because the court determines that the decision is not in the child's best interest, as

> the trial court did in *Troxel* regarding a grandparent's interest in visitation. Instead, the court must presume that a fit parent's decision is in the best interest of the child, and the court may reach a decision contrary to the wishes of the parent only if there is evidence sufficient to overcome that presumption. **II** 337 Or at 119-120 (emphasis supplied).

Following a dissolution ofmarriage---unless there is joint custody (107.169(1): "As used in this chapter, 'joint custody' means an arrangement by which parents share rights and responsibilities for major decisions concerning the child, including, but not limited to, the child's residence, education, health care and religious training . . . ")---the "fundamental right of parents to make decisions concerning the care,

[end of page 32 in original; beginning of page 33]

custody, and control of their children" (Troxel at 530 US 66) necessarily devolves upon the custodial parent.

There was no evidence before the Trial Court that Father is unfit. Therefore, under Troxel, O'Donnell-Lamont, and Harrington, there was no legal authority for the Circuit Court---based on the motions and record before it---to issue the Supplemental Judgment, circumscribing Father's right to make a decision that is his province to make.

**Freedom of Religion**

The factual basis of Father's Judaism and his religiously motivated desire to have his son circumcised is outlined in the Summary of Facts.

Mother does not question this.

The Free Exercise and Establishment clauses of the First Amendment of the United States Constitution place limits on the application of governmental actions that impede freedom of religion.

As the United State Supreme Court noted generally in West Virginia State Board of Education v. Barnette, 319 US 624, 630, 87 LEd 1628 (1943) (which invalidated a compulsory school flag salute despite the religious objections of certain Jehovah's Witnesses),

> " ... freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."

In State of Wisconsin v. Yoder, 406 US 205,32 L Ed 2d 15,92 S Ct 1526 (1972), the Supreme Court ruled that Wisconsin's compulsory school attendance law (under which Amish parents were convicted, for not sending their children to public

[end of page 33 in original; beginning of page 34]

schools) violated the First Amendment. The parents refused to have their children attend public secondary school; they also did not enroll their children in a private school nor have them participate in any non-school alternative that provided essentially the same instruction. Doing so would have violated the defendants' religious beliefs. These beliefs held, inter alia, that school age children (especially secondary age) "must acquire Amish attitudes favoring manual work and the

specific skills necessary to perform the adult role of an Amish farmer or housewife. The must learn to enjoy physical labor .... And ... must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligation imposed by adult baptism." 406 US 211, 32 LEd 2d 22-23.

The Court generalized its analysis by holding that "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 US 215,32 LEd 2d 25.

Closer yet to the instant case, the Court in Yoder held that

> "However read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a reasonable relation to some purpose within the competency of the State' is-required to sustain the validity of the State's requirement under the First Amendment." 406 US 233, 32 LEd 2d 35. (emphasis added).

In Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 US 520, 124 LEd 2d 472, 113 S Ct 2217 (1993). the U.S. Supreme Court decided another case involving the conflict between religiously motivated conduct and an ordinance:
[end of page 34 in original; beginning of page 35]

In Lukumi, the City Council (in Florida) had adopted ordinances that prohibited (a) sacrificing an

animal within the city limits, (b) owning or possessing an animal intending it be used for sacrificial purposes, the application restricted to " any individual or group that "kills, slaughters or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animal is to be consumed." and (c) slaughter (as "the killing of animals for food") outside areas zoned for slaughterhouse use. The ordinances defined "sacrifice" as "to unnecessarily kill, torment, torture, or mutilate an animal in a public or private ritual or ceremony not for the primary purpose of food consumption," Violators were subject to penalties of up to 60 days imprisonment or $500 fine or both.

The Church filed a 42 USC 1983 action in U.S. District Court, seeking declaratory, injunctive, and monetary relief, based on a Free Exercise challenge.

The District Court found that

> " . . . animal sacrifices present a substantial health risk, both to participants and the general public. According to the court, animals that are to be sacrificed are often kept in unsanitary conditions and are uninspected, and animal remains are found in public places. 723 F. Supp. at 1474-1475, 1485. Second, the court found emotional injury to children who witness the sacrifice of animals. 723 F. Supp. at 1475-1476, 1485-1486. Third, the court found compelling the city's interest in protecting animals from cruel and unnecessary killing. The court determined that the method of killing used in Santeria sacrifice was "unreliable and not humane, and that the animals, before being

> sacrificed, are often kept in conditions that produce a great deal of fear and stress in the animal." Id., at 1472-1473, 1486. Fourth, the District Court found compelling the city's interest in restricting the slaughter or sacrifice of animals to areas zoned for slaughterhouse use. Id., at 1486." 508 US at 529-530.

The District Court granted summary judgment to the city and its officials. The 11th Circuit affirmed.

[end of page 35 in original; beginning of page 36]

In reversing, in favor of the church, the U.S. Supreme Court explained the religious context:

> "The sacrifice of animals as part of religious rituals has ancient roots. See generally 12 *id.*, at 554-556. Animal sacrifice is mentioned throughout the Old Testament, see 14 Encyclopaedia Judaica 600, 600-605 (1971), and it played an important role in the practice of Judaism before destruction of the second Temple in Jerusalem, see *id.*, at 605-612. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son. See C. Glasse, Concise Encyclopedia of Islam 178 (1989); 7 Encyclopedia of Religion, *supra,* at 456." 508 US at 524-525.
>
> Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck.

> The sacrificed animal is cooked and eaten, except after healing and death rituals. See 723 F. Supp. at 14711472; 13 Encyclopedia of Religion, *supra,* at 66; M. Gonzalez-Wippler, The Santeria Experience 105 (1982). 508 US at 525.

The Court held, inter alia, that mere facial neutrality in a law is insufficient by itself to withstand a Free Exercise challenge:

> "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," Gillette v. United States, 401 U.S. 437,452,28 L. Ed. 2d 168,91 S. Ct. 828 (1971), and 'covert suppression of particular religious beliefs,' Bowen v. Roy, supra, at 703 (opinion of Burger, C. J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked as well as overt. 'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." Walz v. Tax Comm'n of New York City, 397 U.S. 664, 696, 25 L. Ed. 2d 697, 90 S. Ct. 1409 (1970) (Harlan, J., concurring).'" 508 US at 534-535.

The Court noted the disparate effect on the plaintiff church and its members:

> "It is a necessary conclusion that almost the only conduct subject to Ordinances 87-40,87-52, and 87-71 is the religious exercise of

Santeria church members. 508 US at 535."
[end of page 36 in original; beginning of page 37]
The Court emphasized that religiously motivated conduct cannot, consistent with the Free Exercise Clause, be prohibited while similar conduct, secularly motivated, is allowed:

> "We conclude, in sum, that each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief. The ordinances "have every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers] but not upon itself." Florida Star v. B. J. E.,491 U.S. 524, 542, 105 L. Ed. 2d 443, 109 S. Ct. 2603 (1989) (SCALIA, J., concurring in part and concurring in judgment). This precise evil is what the requirement of general applicability is designed to prevent." 508 US at 545546.

A disparate impact of a facially neutral law on a religious practice triggers strict scrutiny:

> "To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests. McDaniel v. Paty, 435 U.S. at 628, quoting Wisconsin v. Yoder, 406 U.S. 205, 215, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972). The compelling interest standard that we apply once a law fails to meet the *Smith* requirements is not "water[ed] ... down" but "really means what it says." Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. at 888. A law that targets religious conduct for

distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny." 508 US at 546.

Note: while there were multiple opinions, including the Court's opinion and concurrences, with some Justices not joining in the main opinion (by Justice Kennedy), all of the quoted passages above commanded a majority of the Justices on the Court (Justices Kennedy, Rehnquist, White, Stevens, Scalia, Souter, and Thomas).

In Church of the Lukumi Babalu Aye, Inc. the court considered whether the religious freedom clauses of the First Amendment are violated by a *statute* (or an

[end of page 37 in original; beginning of page 38] ordinance). In the instant case we have no such legislative enactment: no Oregon statute prohibits, limits, or conditions circumcision of a minor boy. Indeed, no statute in any state (or any federal statute) does so. Thus in the case at bar, the prohibition sought by Mother---in the form of a stay---is not grounded on any statute (or ordinance). The deference that would ordinarily attach to the legislative branch's enactment is absent here.

In the case at bar, the action Mother urges on the Court---restricting the right of a Jewish custodial parent (whose right to custody has been affirmed on appeal) to have his minor son circumcised would violate the freedom of religion clauses of the Constitutions of the United States (First Amendment) and Oregon (Art. I, Sees. 2 and 3)---

Father's free exercise of religion and the child's (for whom Father, as the custodial parent, is the legal representative).

The closest reported judicial pronouncement there is (in any reported case) involving the right of the government to prohibit a circumcision is contained in dictum in Thomas et al v. Anchorage Equal Rights Commission et ai, 220 F.3d 1134 (9 Cir, 2000). In Thomas, Several landlords mounted a First Amendment free exercise of religion and free speech challenge to the Alaska housing laws prohibiting discrimination on the basis of marital status.

The majority found the case non-justiciable : " ... at this stage the dispute is purely hypothetical and the injury is speculative. Whether viewed through the lens of standing or ripeness, resolution of the First Amendment issues is premature."

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The dissent (Judge Andrew J. Kleinfeld) opined that the case was justiciable.

Judge Kleinfeld's opinion included this insightful dictum (with which the majority did not disagree):

> "Suppose, hypothetically, that a legislature passed a facially neutral law prohibiting circumcision, and that its reason was not anti-religious animus, but concern that the possible pain inflicted on the child exceeded the medical benefits from the procedure. Such a law would make it impossible for Jews and Moslems to practice one of their most sacred religious obligations. I suspect that under *Smith,* the no-circumcision law would be unconstitutional, by analogy to the no-parochial-schools law in *Pierce v. Society of*

*Sisters,* n13 because the no-circumcision law would abridge both the right to rear one's children in one's religion and the free exercise of one's religion. n14

[F ootnotes]

nn 10 and 14 Employment Division v. Smith, 494 U.S. 872,108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990).

n13 Pierce v. Society of Sisters, 268 U.S. 510, 69 L. Ed. 1070,45 S. Ct. 571 (1925). " 220 F3d at 1150.

Judge Kleinfeld's analysis is would be applicable to review of lower court decision based on a *statute,* or *an appellate case.* It is all the more applicable when neither a statute or a case prohibits or restricts the act at the root of the Mother's reason for seeking a change of custody in her motion for order to show cause.

**Summary**

By means of seeking a change in custody, Mother was endeavoring to do indirectly what no law allows: prohibit a custodial parent from having his minor son circumcised (for religious reasons). For that reason alone, the Trial Court was fully justified in denying Mother's request for a fuller evidentiary hearing.

In addition, the relief Mother sought would have violated the United States and Oregon Constitutions (Freedom of Religion); for this reason also, the Court was

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correct in not having a hearing on granting relief it was constitutionally impermissible

to grant.

The Trial Court correctly concluded that it is the custodial parent who is to make the decision about whether to have the minor son of the parties circumcised. Furthermore, the (custodial) parent's right to make such decisions is constitutionally protected.

The Trial Court was also correct in denying Mother's motion for order to show cause because Mother had failed to make even a minimally sufficient preliminary showing that she was entitled to the relief she sought under the applicable law for modification of custody judgments.

Dated this 10th day of April, 2006.

Respectfully submitted.

/s/
James H. Boldt (OSB #76066)
Attorney for Father / Petitioner / Respondent

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C. Freedom of Religion

Another ground supporting the Court of Appeals' decision is that urged by the
[end of page 10 in original; beginning of page 11]
Father there: that freedom of religion protects the decision to have a minor son circumcised. The Court's attention is invited to Respondent's brief in the Court of Appeals at 33-39. Petitioner now relies (Pet. at 8-90 on Prince v. Commonwealth of Massachusetts, 321 US 158, 159-160 (1944)---a case not mentioned in either of Mother's briefs at the Court of Appeals nor at the Trial Court.

Prince, however, is inapposite. The state of Massachusetts was a party. It involved the constitutionality (as against a claim of freedom of religion by Jehovah's Witnesses) of a state *statute* that was part of Massachusetts' comprehensive child labor law. In the case before the Court (a) the state is not a party and (b) there is no legislation prohibiting what the custodial parent seeks to do: have the minor son of the parties circumcised.

The Prince court also cautioned, in its 5-4 ruling that "Our ruling does not extend beyond the facts the case presents." The Court also instructed that

> "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Pierce v. Society of Sisters, supra. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter."

. . .

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. . .

E. Child's Wishes

. . .

More importantly, as Father has noted (Respondent's brief in Court of Appeals at 22-23) the child's attitude about whether he wants the procedure is not legally relevant. Petitioner does not actually dispute that. Indeed, Petitioner

[end of page 10 in original; beginning of page 11]

essentially concedes it: "The child is not old enough to make such a decision for himself; that is what parents are for." (Pet. at 12).

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## IV. The Custodial Parent is the Decision-Maker

A decision about circumcising a boy is for the parents, not the state. When the parents are divorced, that decision devolves upon the custodial parent.

### A. Circumcision is a Decision For Parents, Not the State

In Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), the U.S. Supreme Court held that parental rights to raise their children are constitutionally protected.

"Parents have a fundamental right to autonomy in child rearing decisions." Am Jur 2d, Parent and Child (2007), sec. 17, n. 7.

> "Only a compelling state interest justifies burdening the parent's fundamental right to enjoy a relationship with his child, and the state must bear the burden of demonstrating the necessity for doing so." Am Jur 2d (2007), Parent and Child, sec. 18, n. 5.

New York's highest court affirmed that it is the parents, not the state, who have decision-making authority regarding their child---even when they opt for treatment not supported by most of the medical community. Matter of Hofbauer, 47 N.Y. 2d 648, 393 NE 2d 1009 (1979).

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The Court held that, where a duly licensed physician recommends a course of treatment (even though unconventional and against the weight of medical authority), the parents are free to pursue that course.

Mother produced no medical evidence (in affidavit form or otherwise) that circumcision of the

parties' minor son was medically dangerous or even inadvisable. . . . That position has not been adopted by any state, by the federal government, or (so far as Mother has cited cases) by any country on the planet.

Circumcision is a routine procedure, performed on a majority of boys in the U.S. In this case it is to be performed in the doctor's office. There is no child-specific evidence that suggests---or even begins to suggest---that it is dangerous to this boy. In fact, the evidence in the record is the opposite: (a) no significant risk of harm; no downside; significant medical benefits and (b) it is medically advisable for this boy in particular.

Amicus D.O.C., aligned with Mother, asserts (br. at 4, 10, and 21) that the International Convention on Civil and Political Rights (I.C.C.P.R.) prohibits circumcision. D.O.C. did not provide the citation for the convention; it is 999 U.N.T.S. 171 KAV 2306 (New York 12-16-66; entered into force for the U.S. on 9-8-92).

First, the I.C.C.P.R. says nothing whatsoever about circumcision. Second, no reported decision in any court in the United States has ever so held---even remotely.

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Indeed, D.O.C. cites no implementing statute, nor any case, *anywhere in the world* where the I.C.C.P.R. has ever been so interpreted. Third, even if it stood for what the D.O.C. claims, the I.C.C.P.R. is not binding in American courts. See Construction and Application of International Covenant on Civil and Political Rights 11 A.L.R. Fed. 2d 751 (Originally published in 2006).

**B. When Parents Divorced, Decision by Parent with Custody**

"The essence of custody is the companionship of the child and the right to make decisions regarding his care, control, education, health, and religion. The custodian may determine the child's upbringing, including his or her education, health care, and religious training, without involvement by the court, unless there is a danger to the child's physical health or emotional development." 24A AmJur 2d (2007) Divorce And Separation, sec. 930, nn. 91 and 92.

The Trial Court correctly decided that whether to have an minor son
circumcised is just such a decision---for the custodial parent.

As the Court in Feldman v. Feldman, 378 NJ Super 83, 874 A2d 606 (2005) has noted, in a joint custody situation (a/so in a conflict between a Jewish father with primary physical custody and a non-Jewish mother), held: "The law is clear that the primary caretaker has the right to determine the religious upbringing of the children in his or her charge." (at 874 A2d 611).

It should be noted that the child's attitude about whether he wants the circumcision is not legally significant. The child is not the decision-maker on such questions---any more than an infant is who is circumcised. Had the legislature wanted to have minor boys have a say in it---or even to be able to make the decision on it themselves---they could have adopted a statute to that effect; they have not.

The legislature has adopted statutes giving minors some rights they would not have had at

common law. Examples include:
[in original, end of page 31; beginning of page 32]

1. 109.610 Right to treatment for venereal disease without parental consent

2. 109.640 Right to medical or dental treatment without parental consent; physicians may provide birth control information to any person (minors over 15)

3.109.670 Right to donate blood. (minors over 16)

4. 109.675 Right to diagnosis or treatment for mental or emotional disorder or chemical dependency without parental consent (minors over 16)

5. 109.697 Right to contract for dwelling unit and utilities without parental consent (certain minors over 16).

Second---assuming that the child's wishes are legally significant---while Mother claims the child does not want the circumcision, no one else purports to have heard the child say that---only Mother. There are numerous reasons to conclude otherwise:

1. Mother knew that Father planned to *have* the child circumcised (though she did not know the exact date) on May 9, 2004---23 days before she filed the 'emergency' request for T.R.O. During that time, there is no *evidence* that she did anything to (a) pose a legal objection, (b) *have* her attorney write a letter to Father, (c) express any opposition whatsoever to Father, either orally, in writing, by telephone, or by mail. If she was so adamantly opposed to it, why did she not express some opposition?

Far from expressing opposition on May 9, she discussed with Father the best way to *have* the circumcision performed (local or general anesthesia). Affidavit of James Boldt at 11. Mother does not say

otherwise in her affidavit.

2. Mother says that the child told her that he did not want to be circumcised,

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on May 31, 2004---a single day. Father relates, however, that the child expressed that he wanted to *have* the procedure done, as part of his conversion to Judaism, *many times---in* April, May, and early June (after the child purportedly made the statement Mother attributed to him)---and that he does not want to wait. The child specifically disagreed with Mother's negative position. Affidavit of James Boldt at 1215.

3. Cheryl Boldt, Jacob Boldt, and Dr. Ellen, however, all said that Jimmy clearly stated that he did want the circumcision (as part of his conversion to Judaism).

The meaning of "custody" in family law is delineated in Blacks's Law Dictionary, 8th ed. (2004):

> "The care, control, and maintenance of a child awarded by the court to a responsible adult. Custody involves legal custody (decision-making authority) and physical custody (caregiving authority), and an award of custody usu. grants both rights." (at 412). "legal custody" is defined as "The authority to make significant decisions on a child's behalf, including decision bout education, religious training, and healthcare." (at 413).
>
> "Custody embraces the sum of parental rights with respect to the rearing of a child, including his care and control, education, health, and religion. Am Jur 2d, Parent and Child, sec. 26, n. 1; "the legal custodian of a child is one who

has been given legal custody by court order." (at n. 2). "It is the custodial parent who determines the religious training of the child. C.J.S. (2007), Parent and Child, sec. 82, nn. 7 and 11.

The court in Trompeter v. Trompeter, 218 Kan. 535, 539-542, 545 P2d 297, 300-302 (1976) set forth the commonly accepted definition of "custody" of a child in the context of divorced parents:

> "The real issue in this appeal concerns the meaning of the term 'custody . . . '" and held that '" "Custody embraces the sum of parental rights with respect to the rearing of a child, including its care. It includes the right to the child's services and earnings . . . and the right to direct his activities and make decisions regarding his care and control, education, health and religion. . . ." ]citing authorities].

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Similarly the Supreme Court of Ohio held, in Braatz v. Braatz, 85 Ohio St. 3d 40, 44, 706 NE 2d 1218, 1222 (1999) that "'Custody' resides in the party or parties who have the right to ultimate legal and physical control of a child.

In R.J.D. v. Vaughan Clinic, P.C., 572 So. 2d 1225 (Ala., 1990), the Supreme Court of Alabama reached the same conclusion: a custodial parent is the decision-maker for medical decisions regarding the minor child of divorced parents. In R.J.D., the plaintiff was a 17 year old girl, acting through her father, the non-custodial parent. The girl sued the hospital (for, *inter alia*, false imprisonment) at which she had been involuntarily committed by her mother. The mother had been awarded custody of the girl (then 12) in a dissolution of marriage case.

Over the objection of the father, the girl was involuntarily committed to a secure ward of the adolescent care unit of the defendant hospital. The admission was without the child's consent and against her will.

The trial court granted summary judgment for the hospital. The Supreme Court affirmed. The Court, noting (at 1227) that "the only dispute being over the right of a custodial parent to determine the medical needs of a 17-year-old unemancipated child regardless of the wishes of the child." based its decision on principles applicable to this case:

> "A child, like an adult, has a substantial liberty interest in not being confined unnecessarily for medical treatment, but Alabama has long recognized the principle that parents are, by the common law, under the legal duty of providing medical attention for their children. *Ex parte University of South Alabama*, 541 So.2d 535 (Ala. 1989); *Osborn v. Weatherford*, 27 Ala. App. 258, 170 So. 95 (1936). . . .
>
> Alabama is among the many states that respect this common law duty. *Ex parte University of South Alabama*, supra. . . .
>
> Under the common law it is not the child's consent to such care that controls. Rather, it is the parents' common law right and duty to provide for the well-being of their children that [in original, end of page 34; beginning of page 35] prevail.
>
> . . .
>
> In such matters as deciding on the need for surgical or hospital treatment, the wishes of young children are *not consulted, nor their*

*consent asked when they are old enough to give expression thereto. The will of the parents is controlling,* except in those extreme instances where the state takes over to rescue the child from parental neglect or to save its life. Similarly, the right to grant or refuse a medical examination of a child belongs not to the child, but to the parents.'

As the court noted in Bencomo v. Bencomo, 112 Ha 511, 516, 147 P3d 67, 72 (2006),

"In a divorce case, when the family court awards one person 'sole legal and sole physical custody of' a child, the family court is not authorized to enter additional orders as if it was the legal and physical custodian of that child. One the contrary, it must allow that custodial person the decision-making authority exercisable by the person who has been awarded the sole legal and physical custody of that child."

The court, based on that reasoning, deleted several provisions of the custody judgment that had directed the custodial parent's discussions with the child, the child's medical treatment, the child's sports activities, etc.

## V. Prohibition of Circumcision of Boy Would Violate Freedom of Religion

### A. Importance of Circumcision in Judaism

The Encyclopaedia Judaica (Keter Publishing House, Jerusalem, 1982, with current updates) summarizes (in vol. 5, under Circumcision) the importance of ritual circumcision in Judaism:

"The promise that Abraham's seed should inherit the land of Canaan was bound up together with this covenant. The punishment

for failure to observe this command was *karel,* to be "cut off" from one's kind *(ibid* 21 : 4), understood by the rabbis to mean "excision at the hand of heaven from the community." This commandment is considered so important that the rabbis declared (Shab. 137b) that were it not for the blood of the covenant, heaven and earth would not exist. Abraham was said to have circumcised himself on the tenth of Tishri, the day later celebrated as the Day of Atonement, when the sins of the people are forgiven (PdRE 29)." (pp. 567-568)

"Laws. It is a Jewish father's duty to have his son circumcised (Sh. Ar., YD 260:1)." (p. 570).

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Spinoza declared that the practice of this rite was alone sufficient to ensure the survival of the Jewish people (*Tractatus Theologico-Politicus (1670), 3:53)* . . . Its influence on Jewish life throughout the ages has been so strong, that its observance is often the sole remaining token of affinity with Judaism-even after intermarriage, when the Jewish parent insists on the circumcision of the sons. (p. 575)

In the context of conversion, The New Encyclopaedia of Judaism (New York University Press, 2002), informs us that:

"It is also performed upon male converts to Judaism as a sign of their entrance into that covenant." (Circumcision entry at 172) . . . Circumcision is an essential part of conversion to Judaism for males, though if the convert is already circumcised, a ritual drawing of a drop of blood from the site of the circumcision is performed. (Circumcision entry at 173)

A Guide to Jewish Religious Practice (by Rabbi Isaac Klein, with supplement by Rabbi Joel Roth of The Jewish Theological Seminary of America, Ktav Publishing House, 1992) explains the significance of the rite and adds that it is required for conversion of males. (at 442-443). A Jewish physician may perform it. (at 427). It is an obligation of the father to have his son circumcised. (at 426). The Guide further explains:

> The rite of circumcision is cardinal in Judaism. According to the Bible, it is the sign of the covenant between God and the Jewish people, which began with Abraham (Gen. 17:9-13). While in modern times many Gentiles have adopted circumcision on medical and hygienic grounds, to the Jew it has always had a religious significance. It is the indelible mark of his Jewishness.
>
> . . .
>
> The great value of the rite lies in its high spiritual concept. It is the abiding symbol of the consecration of the children of Abraham to the God of Abraham. The fact that it is performed on the generative organ imparts to it the mystery of life and its perpetuation. The devotion with which this vital and fundamental institution is observed remains unbounded. (at 421).

**B. First Amendment Requirements for Religious Practices**

The United States Supreme Court set forth the basic guiding principles in First Amendment Free Exercise of Religion cases, when there is a conflict with otherwise valid laws, in Sherbert v. Verner, 374 US 398, 83 S Ct 1790, 10 L Ed 2d

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965 (1963). The Court there reversed the Supreme Court of South Carolina in its upholding of the denial of unemployment benefits to the appellant because she refused to work at a job on Saturday (her Sabbath; she was a Seventh Day Adventist). The law was, on its face, neutral. However, the High Court held that

> "For '(i)f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' Braunfeld v. Brown, supra, 366 U.S., at 607, 81 S.Ct., at 1148. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 347 US 404 (emphasis added)."

Analogously, in the instant case, Mother urges the Court to adopt a position would force Father to choose between following the precepts of his religion and forfeiting custody of his child, on the one hand, and abandoning one of the precepts of his religion in order to keep custody of his child, on the other hand.

A difference, of course is that the choice that would be forced on Father is much more severe: not missing a few weeks of unemployment benefits but losing custody of his child.

The United States Supreme Court has set forth the basic test for deciding whether a government action unconstitutionally advances or inhibits the practice of religion in Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) and Committee for Public Education v. Nyquist, 413 U.S. 756, 772-73, 93 S.Ct. 2955, 2965, 37 L.Ed.2d 948 (1973):

> "Taken together, these decisions dictate that to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion. . . ."

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Furthermore, "It is clear from the decisions applying this test that the word 'primary' is not a synonym for 'greater' or 'predominant.' Rather, it is used in the sense of 'direct' or 'nonsecondary,' as distinguished from 'remote' or 'incidental.'" Voswinkel v. City of Charlotte, 495 Fed Supp 588, 594 (1980).

In the case at bar, if the Court were to grant the relief Mother requests, the direct, or nonsecondary, effect of such a holding would clearly be to inhibit Judaism. After any Jewish custodial parent decided to have his or her son circumcised, the non-custodial parent (or perhaps even a third party--- as the amicus D.O.C. aligned with Mother proposes)

could then demand a full (in-person) hearing to call into question this religiously motivated procedure.

This essentially parental decision, practiced by Jews for 3,500 years [since the time of Abraham] would then be made not by the Jewish parent whom the court had already found to be the preferable parent for the child but instead by a judge---without even a preliminary showing that the boy to be circumcised was in any particular danger from the procedure. This procedure (not an isolated or bizarre practice but one which is performed on a majority of boys in the United States) would be subject to post-decree litigation. Why? Not because of any preliminary boy-specific showing of serious bodily harm (for none whatsoever has been shown in this record) but based on the (religiously motivated) practice itself.

It is an area of law where not only intentions but appearances count. The Court in American Civil Liberties Union of Ohio Foundation, Inc. v. Ashbrook, 375 F3d 484, (6 Cir, 2004), cert den 545 US 1152 (2005) (granting an injunction against display, in state courtroom, of the Ten Commandments), emphasized anew that

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"'[t]he Establishment Clause ... prohibits government from appearing to take a position on questions of religious beliefs or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " [footnote omitted] *County of Allegheny v. Am. Civil Liberties Union,* 492 U.S. 573, 593-94, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989)." 375 F3d 490. (emphasis added).

In Stevens v. Berger, 428 F. Supp. 896 (D.C. N.Y., 1977), parents, on behalf of themselves and

their children, asserted the right to not comply with laws (state regulations) requiring Social Security numbers for their children in order for them to received welfare benefits. The reason given was that assigning Social Security numbers to their children conflicted with the parents' religion. The Court (at 906) applied First Amendment freedom of religion jurisprudence to decision-making for their children, finding that otherwise applicable laws (in that case having Social Security numbers for receipt of welfare benefits for children) must give way when they conflict with religious beliefs of parents. The held that

> "Once a bona fide First Amendment issue is joined, the burden that must be shouldered by the government to defend a regulation with impact on religious actions is a heavy one. The basic standard was set out for freedom of religion cases by the Supreme Court in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963). There the Court said that a 'compelling state interest' must be demonstrated. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[only] the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas v. Collins*, 323 U.S. 516, 530, 65 S. Ct. 315, 323, 89 L. Ed. 430. 374 U.S. at 406, 83 S. Ct. at 1795. The Court has recently emphasized this norm:
> It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. . . . [Encroachment]

"cannot be justified upon a mere showing of some legitimate state interest." . . . The interest advanced

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must be paramount, one of vital importance, and the burden is on the Government to show the existence of such an interest. *Elrod v. Burns*, 427 U.S. 347, 362, 96 S. Ct. 2673, 2684, 49 L. Ed. 2d 547 (1976)." (emphasis added).

In Garrett v. Garrett, 3 Neb App 384, 527 NW 2d 213 (1995), both parents sought custody of their four children (ages one to ten). The evidence showed, inter alia, that, as a direct result of the mother's practice of her religion (Jehovah's Witness):

1. the mother's insistence that the children not participate in the celebration of any birthday or holiday, as well as the fact that they were not allowed to pledge allegiance to the flag, caused the children to feel confused and separated from the other children and

2. she would refuse to allow any of her children to receive a blood transfusion, even if the child's life was in peril and the transfusion was desperately needed.

In upholding the award of custody to the mother, the Court held that "The problem with Larry's argument is that the record is devoid of any expert testimony indicating that Jeanne's religious practices are imminently harmful to the children." The court noted, more specifically, that

1. While activities like celebrating birthdays and holidays, saying the Pledge of Allegiance, and participating in extracurricular activities are considered by most people to play an important role

in the socialization of children, 'we need to separate the value judgments implicit in the so-called norm from any actual harm caused by these practices.' *Pater v. Pater*, 63 Ohio St. 3d 393, 398, 588 N.E.2d 794, 799 (1992). '[A] court must base its decision that a particular religious practice will harm the mental health of a child on more than the fact that the child will not participate in certain social activities.' *Id.* at 399-400, 588 N.E.2d at 800. The record in the instant case contains no convincing evidence indicating that the limitations Jeanne places on the minor children's activities constitute a threat of immediate and substantial harm to the children. Therefore, we cannot say that Jeanne's actions in this regard negatively impact on her ability to be the custodial parent. See, *Smith v. Smith*, 90 Ariz. 190, 367 P.2d 230 (1961); *In re Marriage of Urband*, 68 Cal. App. 3d 796, 137 Cal. Rptr. 433 (1977).

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2. " . . . regarding Jeanne's refusal to consent to a blood transfusion for her children even in the event of an emergency, no evidence was presented showing that any of the minor children were prone to accidents or were plagued with any sort of affliction that might necessitate a blood transfusion in the near future. We cannot decide this case based on some hypothetical future accident or illness which might necessitate such treatment. See, *In re Marriage of Urband, supra*; *Waites v. Waites*, 567 S.W.2d 326 (Mo. 1978). . . ."(3 Neb App 395, 527 NW 2d 221; emphasis added).

In the instant case, the Mother was asking the trial court to issue an order to show cause for a motion to change custody, when the evidence before

the trial court indicated no "immediate and substantial harm" to the parties' son.

The U.S. Supreme Court has held that a facially neutral statute violates the First Amendment when it is applied to a religiously motivated action absent a compelling state interest. In Thomas v. Review Bd., Ind. Empl. Sec. Div., 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), the appellant was employed in a foundry. He was assigned after a time to a department that produced turrets for tanks. Working to produce military armaments was contrary to appellant's religion (Jehovah's Witness). Following refused requests to be laid off, he quit. His application for unemployment benefits was denied because his voluntary termination was not based upon a "good cause [arising] in connection with [his] work," as required by the Indiana statute. The denial was upheld by the state supreme court. The United States Supreme Court reversed.

The Court taught that

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." (at 717-718)

The Court further cautioned that:

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> "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling

state interest. However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder, supra*, 406 U.S., at 215, 92 S.Ct., at 1533." (at 718; emphasis supplied).

What compelling state interest is there---or has there ever been held to be---in prohibiting, delaying, or conditioning a Jewish parent's right to a religious ritual that (a) has been practiced for 3,500 years, (b) is performed (for perhaps largely secular reasons) on the majority of boys in the United States, and (c) no law prohibits?

The posture of this case makes clear that the Petitioner on Review's challenge is not to any specific serious harm alleged to be likely to the parties' son---for there has been no showing of that whatsoever---rather the challenge is to circumcision itself. The Mother's affidavit attached to the motion for order to show cause attacks circumcision generally; the attachment to the affidavit is from four non-doctors in Australia urging a policy change in Australian law. Indulging the Mother's personal views in the way she requests is hardly a "compelling state interest" nor an "interest of the highest order."

While the Mother purports to be 'only asking for a hearing,' (which, as noted above, she (a) is not entitled to and (b) if she were, she has received it) but the real effect of the request is something very different: requiring the state (through the person of a judge) to approve (or disapprove) of a custodial Jewish parent's decision to have his son circumcised---a "burden upon religion."---with not even a

preliminary child-specific showing of any "immediate and substantial harm."

In State of Wisconsin v. Yoder, 406 US 205, 32 L Ed 2d 15, 92 S Ct 1526 (1972), the Supreme Court ruled that Wisconsin's compulsory school attendance law (under which Amish parents were convicted, for not sending their children to public

[in original, end of page 42; beginning of page 43] schools) violated the First Amendment. The parents refused to have their children attend public secondary school; they also did not enroll their children in a private school nor have them participate in any non-school alternative that provided essentially the same instruction. Doing so would have violated the defendants' religious beliefs. These beliefs held, inter alia, that school age children (especially secondary age) "must acquire Amish attitudes favoring manual work and the specific skills necessary to perform the adult role of an Amish farmer or housewife. The must learn to enjoy physical labor .... And ... must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligation imposed by adult baptism." 406 US 211, 32 LEd 2d 22-23.

The Court generalized its analysis by holding that "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 US 215,32 LEd 2d 25.

In Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 US 520, 124 LEd 2d 472, 113 S Ct 2217 (1993). the U.S. Supreme Court decided

another case involving the conflict between religiously motivated conduct and an ordinance. The City Council (in Florida) had adopted ordinances that prohibited sacrificing an animal sacrifice within the city limits.

The Church filed a 42 USC 1983 action in U.S. District Court, seeking declaratory, injunctive, and monetary relief, based on a Free Exercise challenge.

In reversing the district court and the Court of Appeals, in favor of the church, the U.S. Supreme Court explained the religious context:

> "The sacrifice of animals as part of religious rituals has ancient roots. See generally 12 *id.*, at 554-556. Animal sacrifice is mentioned throughout the Old Testament, see 14 Encyclopaedia Judaica 600, 600-605 (1971), and it played
>
> [in original, end of page 43; beginning of page 44]
>
> an important role in the practice of Judaism before destruction of the second Temple in Jerusalem, see *id.*, at 605-612. In modern Islam, there is an annual sacrifice commemorating Abraham's sacrifice of a ram in the stead of his son. See C. Glasse, Concise Encyclopedia of Islam 178 (1989); 7 Encyclopedia of Religion, *supra,* at 456." 508 US at 524-525.
>
> Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck.

> The sacrificed animal is cooked and eaten, except after healing and death rituals. See 723 F. Supp. at 14711472; 13 Encyclopedia of Religion, *supra,* at 66; M. Gonzalez-Wippler, The Santeria Experience 105 (1982). 508 US at 525.

The Court held, inter alia, that mere facial neutrality in a law is insufficient by itself to withstand a Free Exercise challenge:

> "Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," Gillette v. United States, 401 U.S. 437,452,28 L. Ed. 2d 168,91 S. Ct. 828 (1971), and 'covert suppression of particular religious beliefs,' Bowen v. Roy, supra, at 703 (opinion of Burger, C. J.).

The Court noted the disparate effect on the plaintiff church and its members: "It is a necessary conclusion that almost the only conduct subject to Ordinances 87-40,87-52, and 87-71 is the religious exercise of Santeria church members. 508 US at 535."The Court emphasized that a disparate impact of a facially neutral law on a religious practice triggers strict scrutiny:

> "To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests. McDaniel v. Paty, 435 U.S. at 628, quoting Wisconsin v. Yoder, 406 U.S. 205, 215, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972). The compelling interest standard that we apply once a law fails to

> meet the *Smith* requirements is not "water[ed] ... down" but "really means what it says." Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. at 888. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases. It follows from what we have already said that these ordinances cannot withstand this scrutiny." 508 US at 546.

In Sherbert, Yoder, and Lukumi Babalu Aye, the Supreme Court was dealing
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with a *statute* that was neutral on its face---yet invalidated because of the effect it had on a party's exercise of religious freedom. In each case the court decided that a party's religiously motivated conduct exempted it from an otherwise applicable law.

A federal trial court applied the same principle in the context of a zoning ordinance in Western Presbyterian Church v. Board of Zoning Adjustment of the District of Columbia, 862 F Supp 538 (D.D.C., 1994). A part of the church's beliefs was feeding the hungry. Doing that, however, was not a permissible use in the zone where the church was located. The church sought an injunction against application of the zoning ordinance to its activities in feeding the hungry. On cross motions for summary judgment, the Court granted the relief prayed for by the church. The court found that "The First Amendment prohibits laws that 'substantially burden' the free exercise of religion. A 'compelling interest' must exist before a state can impose a substantial burden on

religious activities." 862 F Supp 544.

Even a prisoner has Free Exercise rights. Searles v. Van Bebber, 993 F Supp 1350, 1352 (1998) (prisoner sincerely holding Jewish beliefs must be served kosher meals absent a compelling state interest weighing against it).

In the case at bar, the action Mother urges on the Court---restricting the right of a Jewish custodial parent (whose right to custody has been affirmed on appeal) to have his minor son circumcised would violate the freedom of religion clauses of the Constitutions of the United States (First Amendment) and Oregon (Art. I, Sees. 2 and 3)--- Father's free exercise of religion and the child's (for whom Father, as the custodial parent, is the legal representative).

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These courts' rulings become more significant when we consider the special place that circumcision has in Jewish religious practice. A First Amendment Free Exercise claim must look beyond the superficial facial neutrality of a law (assuming there were a law that forbid, limited, or conditioned the religious rite of circumcision) to see its effect on the religious practice of a party concerned.

Other religions have their own practices that can be, to a large extent, analogous. For example, burning of candles is an integral part of Catholic mass.

> "From the early 17th century came legislation making obligatory the use of candles at Mass and determining their number.
>
> Present legislation concerns the quality and number of candles for different occasions. . .

."

New Catholic Encyclopaedia, 1967, Catholic University of America, vol. III, p. 24.

If there were a facially neutral statute prohibiting the burning of candles in non-residential buildings (justified, perhaps even with some statistical and anecdotal support, by reducing the incidence of accidental fires), there would be no doubt, given the Free Exercise jurisprudence discussed herein, that the law would be invalidated as an infringement on the right of Catholics to practice their religion.

In considering a possibility of prohibiting a custodial parent from having his minor son circumcised, primarily for religious reasons, it is helpful to consider the principle set forth in Church of God v. Amarillo Independent School District, 511 F. Supp 613 (1981). There the court considered the claims of parents of public school children. The school district's regulations provided that students would receive a zero for any days they missed beyond two for religious holidays. Plaintiffs were the Church of God and children who were members; the church's teachings included the necessity of abstaining from secular activity for specified holy days. This [in original, end of page 46; beginning of page 47] necessitated missing eight to ten school days per academic year. In granting the plaintiffs' motion for summary judgment to enjoin application of the school policy as to members of the church, the court announced a principle applicable to other contexts:

> "The Supreme Court has interpreted the free exercise clause to proscribe not only overt discrimination but also practices that are fair in form, but discriminatory in operation. See,

Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); Braunfeld v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961). Thus, '(i)f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate between religions, that law is unconstitutionally invalid even though the burden may be characterized as being only indirect.' Braunfeld v. Brwon, supra 607, 81 S.Ct. at 1148." (at 615; emphasis added).

Obviously, in a prohibition of circumcision, the effect is to discriminate against any religion (such as Judaism) having as one of its tenets the ritual of circumcision of boys.

**VI. No Law Prohibits Circumcision**

In the cases above, the courts have invalidated as constitutionally impermissible, various *laws*--- statutes, ordinances, administrative regulations--- (even though, on their face, the laws equally applied to all). In this case, there is no law prohibiting circumcision of boys by a doctor.

Circumcision of a boy by a qualified doctor (a) is not prohibited by any applicable law---no statute in Oregon, in any other state, or by any federal statute prohibits, limits, or conditions such a procedure. Indeed, Mother cites no statute *in the world* prohibiting or even limiting or conditioning the procedure.

No reported case---in Oregon, in any of the 50 states, or in the federal system---has ever prohibited circumcision of a boy (even for secular reasons) by a doctor, called its legality into question, characterized it as unduly dangerous,

[in original, end of page 47; beginning of page 48] or changed custody of a child because the other parent intended to have the parties' child circumcised.

**Summary**

There is thus not just a sparse, or minority, legal authority for the rule Mother urges---but no legal authority at all---even if the reasons for the circumcision were entirely secular. Here, however, the primary reason for it is religious, clearly making the Free Exercise clause of the First Amendment applicable---in addition to the constitutionally protected right of a parent to decide on matters relating to his or her children. Where is the "compelling state interest" against a 3,500 year old ritual that no statute, or case, anywhere, prohibits?

By means of seeking a change in custody, Mother was endeavoring to do indirectly what no law allows: prohibit a custodial parent from having his minor son circumcised (for religious reasons). The Trial Court was fully justified in denying Mother's request for a fuller evidentiary hearing where just that impermissible endeavor would have been the whole point of the (fuller) hearing.

. . .

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C. EFFECTS TOO NARROW---FREEDOM OF RELIGION DIMINISHED

If the Court intends to confine the effects of the decision to exclude other legal, medically recommended procedures sought by a custodial parent---limiting the rule it creates to only male circumcisions of minors---then there is yet a more pernicious problem: violation of the Free Exercise Clause of the First Amendment. The Court's failure to discuss this dimension (though extensively briefed by Respondent on Review and the associated *amici*) does not make it disappear.

The Court appears not to be troubled---though it should be---by the fact that no reported case in Oregon---*or in any state in the union or any federal court*---has ever limited the right of a Jewish custodial parent to have his or her minor son circumcised. Only this Court has done that---and it has gone further---holding, in this case, that a Jewish custodial parent risks losing custody of his child simply because he wants to have his son circumcised.

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1. Facial Neutrality Is Not Sufficient

While the Court's decision does not expressly single out Jewish custodial parents, implicitly, it does just that.

The United States Supreme Court has held that a facially neutral statute violates the First Amendment when it is applied to a religiously motivated action absent a compelling state interest. In Thomas v. Review Bd., Ind. Empl. Sec. Div., 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), the appellant, employed in a foundry, refused to work on the building of armaments, as it was against his

religion. Following refused requests to be laid off, he quit. His application for unemployment benefits was denied. The denial was upheld by the state supreme court. The United States Supreme Court reversed, instructing us that:

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." (at 717-718)

Analogously, in the instant case, the Court's opinion (unless vacated on reconsideration) forces Father to choose between following the precepts of his religion and risk forfeiting custody of his child, on the one hand, and abandoning one of the precepts of his religion in order to be sure of keeping custody of his child, on the other hand. A difference, of course, from Thomas, is that the choice that that is forced on Father is much more severe: not missing a few weeks of unemployment benefits but risk losing custody of his child.

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> The Court in Thomas further cautioned that:
>
> "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been

said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder, supra*, 406 U.S., at 215, 92 S.Ct., at 1533." (at 718; emphasis supplied).

What compelling state interest is there in requiring a custodial parent to first have a Trial Court get the views of a 12 year old before having a legal, medically recommended minor surgical procedure performed on the child? No court, in any reported case, has ever remotely so held.

Similarly in State of Wisconsin v. Yoder, 406 US 205, 32 L Ed 2d 15, 92 S Ct 1526 (1972), the Supreme Court ruled that Wisconsin's compulsory school attendance law (under which parents were convicted) violated the First Amendment as applied to Amish parents refused to have their children attend school---or have them participate in any non-school alternative that provided essentially the same instruction. Doing so would have violated the parents' religious beliefs) violated the Free Exercise Clause as applied to the Amish parents---even though the law was facially neutral and unquestionably applicable to others.

The Court held, in language that has been echoed since and is also applicable to this case, that "The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 US 215,32 LEd 2d 25.

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2. Court's Ruling Inconsistent with First Amendment Requirements

In effect, the custodial parent, under the Court's ruling, would be punished for practicing his religion---requiring Trial Court ascertainment of the child's view and opening up the possibility of the Trial Court limiting, or even removing, the custodial parent's custody---even when that practice involves a medically recommended, legal, minor surgical procedure that is performed on 57% of male children in the United States (Respondent on Review's br. at 16).

Another paradigm for analysis of First Amendment Free Exercise cases was formulated by the United States Supreme Court in Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971):

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243, 88 S.Ct. 1923, 1926, 20 L.Ed.2d 1060 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' Walz, supra, at 674, 90 S.Ct., at 1414."

This Court's holding, however, fails the Lemon test---in all three ways:

1. There is no legislative purpose at all; there has been no legislative enactment. Indeed, what inference there is of "legislative purpose" is the opposite:

The Oregon legislature has adopted statutes

giving minors some rights they would not have had at common law---such as:

A. 109.610 Right to treatment for venereal disease without parental consent

B. 109.640 Right to medical or dental treatment without parental consent; physicians may provide birth control information to any person (minors over 15)

[end of page 12 of original; beginning of page 13]

C.109.670 Right to donate blood. (minors over 16)

D. 109.675 Right to diagnosis or treatment for mental or emotional disorder or chemical dependency without parental consent (minors over 16)

E. 109.697 Right to contract for dwelling unit and utilities without parental consent (certain minors over 16).

Notably absent from such legislative policy-making, however, is any requirement for considering the child's viewpoint in the decisions of a custodial parent in matters of circumcision of a minor male. The statute the Court cited, regarding a means of ascertaining information from the child (ORS 107.425) does not make such ascertainment mandatory for any case.

2. The primary effect of the ruling is does indeed inhibit religion---a particular religion: Judaism. There is no other religion (other than, to some extent, Islam, mentioned in Respondent on Review's brief on the merits at 15-16) whose tenets command that boys be circumcised.

As the court noted in Voswinkel v. City of Charlotte, 495 Fed Supp 588, 594 (1980) "It is clear from the decisions applying this test that the word

'primary' is not a synonym for 'greater' or 'predominant.' Rather, it is used in the sense of 'direct' or 'nonsecondary,' as distinguished from 'remote' or 'incidental." . The very nature of the Court's ruling is aimed, in effect (though perhaps not intent) at a *Jewish* religious practice. Presumably, if the procedure were undertaken for a secular (medical) reason, the Court would not have ruled the way it did. This inhibition of the Jewish religion is squarely within what Lemon says government cannot do.

[end of page 13 of original; beginning of page 14]

3. Lemon also mandates that the challenged action not "foster "an excessive government entanglement with religion"---yet that is just what the Court's ruling does---or at least invites. This Court instructed that If the boy "opposes the circumcision, it must then determine whether M's opposition to the circumcision will affect father's ability to properly care for M. And, if necessary, the trial court then can determine whether it is in M's best interests to retain the existing custody arrangement, whether other conditions should be imposed on father's continued custody of M, or change custody from father to mother." (slip op. at 15).

If the Trial Court must "determine" whether to (a) keep custody as it is and allow the circumcision to go ahead, (b) impose "conditions" on Father's custody, or (c) change custody from Father to Mother, the Trial Court will necessarily be called upon to wrestle with considerations of the role of Judaism in the child's life (as well as the Father's), the relationship of the Father and the child (which is inextricably intertwined with the Father's---and the

boy's---practice of Judaism, for he is, as the record shows and has never been questioned by the Petitioner on Review, deeply involved in that), the reasons the child may not agree with the circumcision, possibly conflicting reasons the child may have for wanting it, the medical aspects, etc. It is an open---and virtually unavoidable---invitation to do exactly what Lemon proscribes: foster an excessive entanglement with religion.

It is also important that the government not *appear* to take a position on religious beliefs. American Civil Liberties Union of Ohio Foundation, Inc. v. Ashbrook, 375 F3d 484, (6 Cir, 2004), cert den 545 US 1152 (2005) cautions that

"'[t]he Establishment Clause ... prohibits government from appearing to take a position on questions of religious beliefs or from 'making adherence to a religion

[end of page 14 of original; beginning of page 15]

relevant in any way to a person's standing in the political community.'" [footnote omitted] *County of Allegheny v. Am. Civil Liberties Union,* 492 U.S. 573, 593-94, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989)." 375 F3d 490. (emphasis added).

Unfortunately, the Court's opinion appears to do just that: it is, obviously, a *Jewish* custodial parent who typically would want to have his or her minor son circumcised (especially for religious reasons). That is the only category of custodial parent (or any parent) that any court in any reported case has ever inhibited from having a circumcision done---this Court. Would the Court have ruled the same way if a custodial parent had wanted to have his or her son circumcised for secular reasons? Then would the Court have required that, even though the

procedure was medically recommended by a physician (urologist) who had examined the child, the 12 year old's position on the issued would first have to be ascertained by the Trial Court?

3. Religiously Motivated Conduct Receives Special Protection

While the case at bar does not involve the custodial parent's right to believe, per se, it does affect his right to an aspect of the *practice* of his religion: circumcision. Restrictions on the *practice* of religion were addressed by the United States Supreme Court in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 US 520, 124 LEd 2d 472, 113 S Ct 2217 (1993). There the Court decided another case involving the conflict between religiously motivated conduct and a law (ordinance) that was, on its face, of general applicability and effect (prohibiting animal sacrifices). In striking down the law as it applied to the church members (who practiced animal sacrifice as part of their religions) the Court instructed that

> "To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order' and

[end of page 15 of original; beginning of page 16]

> must be narrowly tailored in pursuit of those interests. McDaniel v. Paty, 435 U.S. at 628, quoting Wisconsin v. Yoder, 406 U.S. 205, 215, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972). . . . A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict

scrutiny only in rare cases." (emphasis added) 508 US at 546.

4. Disproportionate Effect on Jewish Custodial Parents

It would be myopic and facile---at best---to assert that the decision does not disproportionately affect Jews; it obviously does. Both Respondent on Review (br. at 35-36), who is Jewish, and the *amici* American Jewish Congress, American Jewish Committee, Anti-Defamation League, and Union of Orthodox Jewish Congregations of America (br. at 2-4 and 23) have demonstrated amply that circumcision of males is an integral part of a 3,700 year tradition among Jews. The Court does not question this.

No other group (with the possible exception of Muslims, Respondent on Review's br. on the merits at 15-16) would be affected by the extra roadblocks and disincentives the Court has erected for a custodial parent seeking to have his or her son circumcised for primarily religious reasons---not Presbyterians or Catholics or Hindus or Baptists or Sikhs or atheists---but Jews are directly and adversely affected.

The net effect of the Court's decision is that a Jewish parent even wanting or intending to have his or her minor son circumcised would expose himself or herself to risking a loss (or curtailment) of custody, whereas another parent who decided to have his or son circumcised, for secular reasons, would not be exposed to that risk. this is a rather clear violation of the First Amendment Free Exercise Clause.
[end of page 16 of original; beginning of page 17]

The Court's opinion thus violates the First Amendment rights of the custodial parent. Upon

reconsideration, it should be vacated and the holdings of the Trial Court and the Court of Appeals should be affirmed.

D. PARENTAL RIGHTS VIOLATED

In this case, the Court has, for the first time in its 148 year history, required that a trial court first consider a *child's* view of a custodial parent's decision.

In Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), the U.S. Supreme Court held that parental rights to raise their children are
constitutionally protected.

That reflects a virtually universal precept in American law. "Parents have a fundamental right to autonomy in child rearing decisions." Am Jur 2d, Parent and Child (2007), sec. 17, n. 7.

New York's highest court affirmed that it is the parents, not the state, who have decision-making authority regarding their child---even when they opt for treatment not supported by most of the medical community. Matter of Hofbauer, 47 N.Y. 2d 648, 393 NE 2d 1009 (1979). There the Court held that, where a duly licensed physician recommends a course of treatment (even though unconventional and against the weight of medical authority), the parents are free to pursue that course.

This Court itself has held, in this case, that "although circumcision is an invasive medical procedure that results in permanent physical alteration of a body part and has attendant medical risks, the decision to have a male child circumcised for medical or religious reasons is one that is commonly and historically made by parents in the United States." (slip op. at 12).

[end of page 17 of original; beginning of page 18]

As noted above, when parents are divorced, the parental rights of decision-making devolve upon the custodial parent.

This Court itself has essentially recognized that, writing that "We agree with the trial court that the authority of the custodial parent to make medical decisions for his or her child, including decisions involving elective procedures and decisions that may involve medical risks, is implicit in both our case law and Oregon statutes." (slip op. at 9).

More specifically (as noted above), the Court has held, in this case, that "We also conclude that the decision to circumcise a male child is one that generally falls within a custodial parent's authority, unfettered by a noncustodial parent's concerns or beliefs -- medical, religious or otherwise." (slip op. at 13).

The Court then veers away from its own moorings---as well as the constitutionally protected rights of a parent---by directing that the decision (on whether the custodial parent can have the parties' minor son circumcised) will be made not by the custodial parent but (in effect) rather by the Trial Court, with the input of the child. They become, in effect, the decision-makers---not the custodial parent. The Court's opinion thus violates the constitutionally protected rights of the custodial parent. Upon reconsideration, it should be vacated and the holdings of the Trial Court and the Court of Appeals should be affirmed.

. . .

[excerpt ends on page 18 of original]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF JACKSON

| | |
|---|---|
| In the Matter of the Marriage of: | ) |
| JAMES H. BOLDT, | ) |
| Petitioner, | ) |
| and | ) |
| LIA BOLDT, | ) |
| Respondent. | ) |
| | ) |

No. 98-2318-D(3)

MOTION FOR ORDER TO SHOW CAUSE RE MODIFICATION OF JUDGMENT (Custody)

COMES NOW the Respondent herein, Lia Boldt, and moves this court for an order directing the Petitioner to appear in the above-entitled court to show cause, if any he has, why a supplemental judgment should not be entered herein amending the Judgment Modifying Decree entered herein on October 10, 2002, as follows:

1. Changing legal and physical custody of the parties' minor child, Misha, from the Petitioner to the Respondent,

2. Entering a new parenting plan to provide for parenting time for the Petitioner, and

3. Changing the child support judgment to provide that the Petitioner shall pay reasonable child support, according to the guidelines, to the Respondent.

It is estimated that the hearing on this modification request will take two days. This motion is based upon ORS 107.135 and the attached Affidavit of Lia Boldt,

which is incorporated by reference herein.
[end of page 1 in original; beginning of page 2]
Dated this 3rd day of June, 2004.

_____

Clayton C. Patrick, #77298
Attorney for Petitioner
[certificate of mailing omitted]

[attachment to Motion for Order to Show Cause]
IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF JACKSON

| | |
|---|---|
| In the Matter of the Marriage of: | ) |
| JAMES H. BOLDT, | ) |
| Petitioner, | ) |
| and | ) |
| LIA BOLDT, | ) |
| Respondent. | ) |

No. 98-2318-D(3)

AFFIDAVIT OF
LIA BOLDT

State of Oregon )
) ss.
County of Jackson )

Lia Boldt, being first duly sworn, deposes and says:

1. I am the Respondent in the above-entitled matter and I make this affidavit to support my Motion for an Order to Show Cause, and my Motion for Temporary Custody and Restraining Order.

2. I learned on Sunday, May 31,2004, that the Petitioner was planning to have our nine year old son, Misha, circumcised on Tuesday evening, June

2,2004. I immediately contacted my attorney of record, Pat Wolke, but was informed he was out of town, or otherwise unavailable. I then called one of my appellate attorneys, Clayton Patrick, and left a message for him. He called me on Tuesday, and informed me he had been out of town over the Memorial Day weekend. Monday was the Memorial Day holiday.

3. I also asked the Petitioner to defer the planned circumcision until I could present this matter to the court for review, but he refused. On Tuesday afternoon, June 2,2004, a short hearing [in original, end of page 1; beginning of page 2] was held before Judge Orf, and she issued a temporary restraining order against the planned circumcision until these motions could be presented and heard by the court.

4. Although the Petitioner testified that Misha was agreeable with this circumcision, on Sunday, May 31, he told me just the opposite, that he did not want to have the circumcision. Petitioner has stated that the circumcision was planned so that he could convert Misha from the Russian Orthodox Christian faith (in which Misha was baptised), to the Jewish faith, to which the Petitioner himself has converted. Misha told me that he says what the Petitioner wants him to say because he is afraid of him, and afraid of contradicting him. I hope that ultimately the court will be able to interview Misha in chambers so that his true feelings about this can be determined. I know that I believe my son in his expression to me of opposition to this procedure.

5. I am less concerned about the change of Misha's religion, than I am about the fact that this

conversion requires him to be circumcised. I believe my child is in immediate danger in that I have been informed and believe that circumcising a nine year old boy, particularly if it is done against his express wishes amounts to child abuse.

6. Since Petitioner first mentioned to me last month that circumcision was a possibility for Misha's future (although Petitioner did not tell me then that it would happen so soon), I have done some research on whether or not this was a good thing for my son. I have attached as Exhibit A to this Affidavit a law review article published in 2000 which concludes that "non-therapeutic circumcision of unconsenting minors amounts to culturally sanctioned physical and sexual abuse." Boyle, Svoboda & Price, "Circumcision of Healthy Boys: Criminal Assault?," 7 Journal of Law and Medicine 301, (2000) (appears at page *21* of this internet copy of the article). The respected authors of this article also cites the opinion of the American Cancer Society that circumcision is not "a valid or effective measure to prevent" penile cancer. Id. (at page 5 of this internet copy of the article), Petitioner testified earlier that the circumcision was not "medically necessary," but that the doctor who was to perform the circumcision thought it was a good idea to prevent penile cancer.

[end of page 2 of original; beginning of page 3]

Apparently the American Cancer Society disagrees with this view.

7. I also have learned of situations where children were permanently injured, either by having a deformed penis, or even brain damage, or death, as a result of a botched circumcision. My attorney will brief the legal cases which arose from these incidents for the court prior to a hearing on the merits of my motion.

This information, needless to say, causes me great concern for my son, given that such dramatic injuries can occur from what is supposed to be a "routine" procedure, particularly if there is no medical necessity for the procedure, and my son does not want to have it done.

8. Therefore, I have good reason to believe that the circumcision procedure planned for Misha, since it is against his wishes, amounts to physical and sexual abuse of my son. Therefore, as long as Petitioner is planning to have this procedure performed, my son is in immediate danger of such abuse. I ask therefore that I either be granted custody of my son so that this can be prevented, or that the court will condition Petitioner's continued custody of my son on his agreement that this procedure not be performed at any time in the future.

Dated: June 4, 2004

_____

Lia Boldt

Subscribed and sworn to before me this 4th day of June, 2004.

_____

Notary Public for Oregon

[end of affidavit itself; attached law review article http://www.cirp.org/library/legal/boylel/, followed in original]